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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 367

JOHN MYERS, PETITIONER,

vs.

READING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED AUGUST 5, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT**

JOHN MYERS, Appellant,

vs.

READING COMPANY

Appendix to Appellant's Brief—Filed February 25, 1946

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1-367
8-11

DOCKET ENTRIES

1944
Dec. 1. Complaint filed.
Dec. 1. Summons exit.
Dec. 1. Plaintiff's demand for jury trial filed.
Dec. 13. Appearance of Henry R. Heebner, Esq., for Defendant filed.
Dec. 26. Summons returned: "on Dec. 2, 1944, served" and filed.
Dec. 27. Answer filed.
Dec. 29. Order to place case on the Trial List filed.
1945
May 22. Jury called and sworn.
May 22. Trial—Witnesses sworn.
May 23. Trial resumed.
May 24. Trial resumed.
May 24. Plaintiff's points for charge filed.
May 24. Defendant's points for charge filed.
May 24. Verdict in favor of plaintiff in sum of $5000.
May 24. The jury answers certain interrogatories. (See minutes)
May 24. Judgment in favor of plaintiff in $5000. filed. 5-25-45 noted and notice mailed.
May 24. Order of Court directing U. S. Marshal to furnish meals to jurors filed.
June 1. Defendant's motion to set aside verdict and judgment etc. filed.
June 5. Testimony filed. (1 vol.)
June 28. Argued sur motion to set aside verdict C.A.V.

Dec. 28. Opinion, Bard, J., granting motion for judgment N.O.V. filed.

Dec. 28. Judgment setting aside judgment in favor of [fol. 2] plaintiff and entering judgment for defendant filed. 12-29-45 noted and notice mailed.

1946

Jan. 2. Plaintiff's notice of appeal filed. 1-3-46 Copy to H. R. Heebner.

Jan. 2. Copy of Clerk's notice to U. S. Circuit Court of Appeals filed.

Jan. 16. Designation of contents of record on appeal filed.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed Dec. 1, 1944

The plaintiff is John Myers, a resident of the City and County of Philadelphia, Commonwealth of Pennsylvania, and he herewith asks of the defendant the sum of fifty thousand ($50,000.) dollars, upon a cause of action whereof the following is a statement:

1. This action arises under the Act of Congress, April 22, 1908, c. 149; 35 Stat. 65, and amendments thereto, U.S.C.A., Title 45 sec. 51 et seq., and further amended by the Act of Congress approved by the President of the United States on August 11, 1939, Chapter 685—1st Session of the 76th Congress, known and cited as "The Federal Employer's Liability Act," and under the Safety Appliance Acts, Title 45, U.S.C.A., Sec. 1-23, inclusive.

2. That at all times herein mentioned the Reading Company was, and now is, a railroad corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania.

[fol. 3] 3. That at the time and place herein mentioned in paragraph 5, and for a long time prior thereto, the defendant as a common carrier operated, by electric and steam power, trains carrying passengers, freight, express packages, baggage, foreign and domestic mail in commerce between the different States of the United States and its territories.

4. That at the time and place herein mentioned, the decedent and the defendant were engaged in interstate

commerce between the different States of the United States and its territories.

5. On June 11th, 1944, the plaintiff John Myers was employed by the defendant, as a Conductor and was working in the defendant's yards at Port Richmond, when, due to the negligence of the defendant, its agents, servants or employees, he was thrown from the top of a freight car and sustained severe, painful and permanent injuries hereinafter more fully set forth.

6. At the time and place aforementioned, the said agents, servants or employees of the defendant who were responsible for the injury to the plaintiff, were acting in the scope and course of their employment with, and under the direct and exclusive control of the defendant Reading Company.

7. The negligence of the said defendant by its agents, servants or employees, did consist of the following:

(a) Failure to give notice or warning to the plaintiff, of the intention to move the said train at the time and place aforementioned.

(b) The said fellow-employees did carelessly, recklessly and negligently operate the said train in a shifting manner without warning or notice to the plaintiff, and without due regard for the point and [fol. 4] position in which he was then working, and without due respect for the work he was then performing as a result of which the movement made by the said fellow-employees was negligent, careless, and the cause of this accident.

(c) Violating the rules of the company in regard to the operation of such trains under the circumstances, the same being Rule 30 and other rules unknown to the plaintiff by number, as pertain to the shifting, stopping and moving of trains with the required signals and notice.

(d) Failure to ring the bell, or whistle, before operating the said engine and/or train.

(e) Failure to provide the plaintiff with a safe place to work.

(f) Violating the standards prescribed by the Interstate Commerce Commission under the circumstances then and there attendant, the same being in regard to equipment and movement of trains.

(g) The fellow-employees were negligent in that they did move the said train without knowing the whereabouts of the plaintiff.

(h) The fellow-employees were further negligent in moving the train without first obtaining the permission of the plaintiff who was their superior.

(i) The defendant was further negligent in that it supplied a defective brake upon the freight car in question.

(j) Negligent at law.

8. The defendant was further negligent in that it did violate the Safety Appliance Acts pertaining to safety couplings and brakes, in that the said couplings and brakes were defective.

9. The plaintiff has been obliged to expend various and divers sums of money for medicine and medical at- [fol. 5] tention in an effort to cure himself of the ills he suffered as a result of this accident, and will be obliged to continue spending such sums for an indefinite time in the future, to his great detriment and loss.

10. As a result of the accident aforementioned, the plaintiff has suffered severe injury to his back; his hands and fingers; concussion of the brain, with injury to its nerves, cells, tissues and functions; severe and permanent injury to his nerves and nervous system.

11. As a result of the accident aforementioned, the plaintiff has been unable to attend to his usual and daily duties and occupations, and he will continue to be unable to do so for an indefinite time in the future, to his great detriment and loss.

12. As a result of the accident aforementioned the plaintiff has been obliged to endure great pain, physical agony and mental anguish from the moment of the accident up to the present date, from now on and hereafter, to his great detriment and loss.

13. As a result of the accident aforementioned the plaintiff has suffered great permanent loss of earnings and earning capacity, to his great detriment and loss.

14. At the time of the accident aforementioned the defendant did violate the various laws of the Congress of the United States, the rules, regulations, orders of the Interstate Commerce Commission, in reference to the operations of trains under the circumstances.

15. The plaintiff herein has been damaged in the amount of fifty thousand ($50,000.00) dollars.

[fol. 6] Wherefore, the plaintiff demands judgment against the defendant Reading Company in the sum of fifty thousand ($50,000.00) dollars.

Respectfully submitted, B. Nathaniel Richter, and Benjamin Fertik, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT.—Filed Dec. 27, 1944.

Answering the averments contained in the Complaint, the defendant, by its attorney, Henry R. Heebner, Esq., replies thereto in accordance with the numbered paragraphs thereof as follows:

1. It is admitted that the plaintiff claims the right to recover under the Federal Employers' Liability Act and the Safety Appliance Acts, as stated in paragraph 1 of the Complaint.

2, 3 and 4. The averments of paragraphs 2, 3 and 4 of the Complaint are admitted.

5. It is admitted that on June 11, 1924, the plaintiff was employed by the defendant as a Conductor and was working in the defendant's yards at Port Richmond, Philadelphia. It is denied that the plaintiff was thrown or fell from a freight car, and it is further denied that any injuries which he may have suffered on said date were due either to the negligence of the defendant or any of its servants, agents or employees.

[fol. 7] 6. It is denied that the defendant either through its agents, servants or employees, or otherwise, is responsible for the injuries alleged to have been suffered by the plaintiff as alleged in paragraph 6 of the Complaint.

7. It is denied that the defendant, either through its agents, servants or employees, or otherwise, was negligent in any of the respects set forth in paragraph 7 of the Complaint, or that any rules of the Company, regulations of the Interstate Commerce Commission or statutes were violated by any of its servants, agents or employees, as alleged in said paragraph, and it is further denied that there was any defect in any brake or other equipment

of any of the cars with the movement of which the plaintiff was in any way connected or concerned.

8. It is denied that the defendant, through any of its agents, servants, employees or otherwise, violated any provisions of the Safety Appliance Acts, or that any couplings or brakes on any of the cars with which the plaintiff came in contact were defective either with respect to their couplings or their brakes, or otherwise.

9, 10, 11, 12 and 13. Defendant is without any knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in paragraphs 9, 10, 11, 12 and 13 of the Complaint, and therefore denies the same and demands proof thereof at the trial if material.

14. It is denied that the defendant through its employees, agents, servants or otherwise, violated any laws of the United States or any of the rules, regulations or orders of the Interstate Commerce Commission with respect to the operation of trains under the circumstances.

15. It is denied that the plaintiff has suffered damage in the amount of $50,000., or in any other sum, as the [fol. 8] result of any negligence on the part of the defendant, its servants, agents or employees. Therefore it is denied that defendant is liable to the plaintiff in said sum or any other sum whatsoever.

Separate Defense

Defendant avers that if the plaintiff suffered the injuries and losses alleged in the Complaint, they were caused by either illness or the physical condition of the plaintiff at the time and were not the result of any accident in the course of his employment or any negligence on the part of the defendant or any of its servants, agents or employees.

Henry R. Heebner, Attorney for Defendant, 2107 Fidelity-Philadelphia Trust Bldg., Philadelphia, Pa.

[fol. 9] IN UNITED STATES DISTRICT COURT

STATEMENT OF EVIDENCE—Filed June 5, 1945

Philadelphia, Pa., May 22, 1945.

Before HON. GUY K. BARD, J., and a Jury.

APPEARANCES: B. Nathaniel Richter, Esq., for the plaintiff. Henry R. Heebner, Esq., for the defendant.

The Court: Are you men ready to swear the jury?

Mr. Richter: Yes, sir.

Mr. Heebner: I am.

(The jury is duly empaneled and sworn.)

The Court: Are you both ready, gentlemen?

Mr. Richter: Yes, sir.

[fol. 10] Mr. Heebner: We are.

The Court: All right.

(Counsel for the plaintiff makes his opening statement to the jury.)

(Counsel for the defendant makes his opening statement to the jury.)

PLAINTIFF'S EVIDENCE

Mr. Richter: Mr. John Myers, take the stand, please.

JOHN MYERS, having been duly sworn, was examined and testified as follows:

Direct examination (N. T. pp. 2-32, inc.).

By Mr. Richter:

Q. Mr. Myers, you are the plaintiff in this case?

A. Yes.

Q. And where do you live?

A. 4248 North 6th Street.

Q. Philadelphia?
A. Philadelphia.
Q. Married?
A. Married, yes, sir.
Q. And what is your wife's name?
A. Catherine.
Q. Do you have any children?
[fol. 11] A. Three daughters.
Q. And they range in age——
A. From 10 to 16.
Q. On June 11, 1944, you were employed by the Reading Company?
A. I was.
Q. What was your job?
A. Conductor.
Q. That is on freight trains?
A. On freight, yes, sir.
Q. And your wife works for the Reading Company, too?
A. And she still does?
A. She still does.
Q. What does she do?
A. Helper, I call it—in place of the fireman.
Q. She works on a freight engine?
A. Yes, sir.
Q. And your wife is sitting in back of me right now?
A. That is right.
Q. On June 11, 1944, you were working at the Port Richmond yard of the Reading Company?
A. I was.
Q. And you were working as a member of a shifting crew?
A. That is right.
Q. Am I correct when I say that you were the conductor, Mr. Milton Weisel was the engineer, and Mr. Kiernan was the fireman?
A. That is right.
Q. And Mr. Kelleher was one of the brakemen, and Daniel Hinkle was the other brakeman?
A. That is right.
Q. Daniel Hinkle was a new man?
A. He was.
Q. He just came on for the first time that day?
A. That is the first time.

[fol. 12] Q. As conductor, who was boss of the freight train?

A. The conductor is.

Q. That would be yourself?

A. Myself, yes.

Q. Will you go on, please, and just give us a general idea of the kind of work that your crew was doing on this night?

A. Well, we were classifying coal hoppers.

Q. What do you mean by classifying coal hoppers?

A. There are different grades of coal that had to be classified, all of one kind on one track.

Q. How did you know what kind of coal was in any particular car?

A. On the side of the car there is a ticket telling you what kind of coal is in there—for classifying.

Q. How did you know that certain cars were to go on certain tracks?

A. From orders by the yardmaster.

Q. And what do those orders show—do they show the car numbers?

A. No, the name of the coal—with the names of the different coal and what tracks they are to go on.

Q. You knew the cars and where to move them?

A. That is right.

Q. And what time that evening had you come to work?

A. Why, 6:30.

Q. And how long were you to be on duty?

A. To 6:30 the next morning.

Q. That would be 12 hours?

A. 12 hours, yes.

Q. Will you tell us how long you had been working for the Reading Company prior to this date, June 11, 1944?

A. I judge around six or seven years.

Q. Had you moved up the ranks from watchman?

A. I had, from crossing watchman to conductor.

Q. So that you had risen to the point where you were conductor on freight traffic, is that correct?

A. That is right.

[fol. 13] Q. In the ordinary job that you were doing, how many days a week were you working, let us say, within five or six months prior to this accident?

A. Practically every day.

Q. And how many hours a day?

A. Twelve hours, and sometimes I worked 16 hours.

Q. The ordinary day is an 8-hour shift?

A. An 8-hour shift, yes, sir.

Q. About what time of the day did this accident happen?

A. I would say about 9:30.

Q. Was it light or dark?

A. It was just getting dark—it was more dark than light.

Q. Did you have a lantern with you?

A. I had—I had my lamp with me.

Q. Is that the standard lantern that railroad men use?

A. Yes, right from the Reading Company.

Q. And what do you use that lantern for?

A. To pass signals.

Q. Explain to me what you mean by passing signals—what kind of signals?

A. Stop signals, moving signals, proceed signals—whatever we want done—or backing up.

Q. You have signals that are known to all of you, and by watching the movements of the lantern they can see what they want done?

A. That is correct.

Q. Coming down to the time of this accident, will you tell us what move was being made at that time?

A. The time I got hurt?

Q. Yes. Had you been bringing some cars in on a certain track?

A. Yes, from the run-around, I believe it is called, on these tracks they have there.

Q. How many cars were you bringing in?

A. Seven.

Q. Were they pulled or pushed in?

A. Pushed in.

[fol. 14] Q. Were they being pushed with the engine front to the car or the engine rear to the cars?

A. The front toward the cars.

Q. On the track on which you were bringing these cars were there already some other cars?

A. There were already some cars.

Q. How many cars were there?

A. I judge around three cars, in my estimation—if I remember.

Q. And were these cars coupled to the other cars already there?

A. Yes, they were.

Q. Who made the coupling?

A. Hinkle.

Q. The new man?

A. Yes, sir.

By the Court:

Q. You mean that he coupled these seven cars to the three that were already standing there?

A. Yes, sir.

By Mr. Richter:

Q. When a coupling is being made, what does the man who is brakeman have to do?

A. After the coupling is made?

Q. As he is making the coupling, what does he have to look for—the jaw?——

A. He watches the knuckle.

Q. Is that so that the cars are properly coupled?

A. Yes, so that the cars are properly coupled.

Q. After this move was completed, what job were you going to do thereafter?

A. I don't know, because I had no orders as yet. I had to get orders from the yardmaster, and——

[fol. 15] Q. And thereafter where did you take the engine?

Mr. Heebner: Wait a minute. He just said he had no orders.

Mr. Richter: I misunderstood——

The Court: He said he didn't know. Just let him tell what happened.

By Mr. Richter:

Q. At any rate, you had not received any specific instructions as to the next move?

A. Not yet.

Q. What, if anything, did you direct Hinkle to do?

A. To tie the hand-brakes on.

Q. On to what?

A. On the rear cars we had just pushed in.

Q. When you say to tie the hand-brakes, what do you mean?

A. I mean to put the hand-brakes on and secure the cars from running away.

Q. As these cars are pushed, are these cars on a grade or on the level?

A. They are on a slight grade.

Q. They are on a grade up or down?

A. Down toward the river.

The Court: Would that be looking front?

Mr. Richter: That would be east.

The Witness: Looking east toward the river.

[fol. 16] By the Court:

Q. So that you tightened these brakes on the rear end of the train?

A. On the rear end.

By Mr. Richter

Q. Now, will you tell us, please, something about the point where these tracks end, is there any sort of contraption there that would hold these cars if they rolled?

A. In my estimation there is a very small bumper—not very strong——

The Court: No, just tell us what it is. It is a bumper, you say?

The Witness: It is.

The Court: We don't want your estimation—just tell us what it is.

The Witness: It is made of a kind of steel, it ain't very strong—it wouldn't hold the cars.

Mr. Heebner: I object to that.

The Court: Yes, that is a conclusion; strike that out. That is for the lawyers to argue later, and for the jury to determine whether it was ample or not. We just want you to tell us what you saw.

The Witness: There was a bumper, I saw.

The Court: Tell us what the bumper is like.

[fol. 17] By Mr. Richter:

Q. How was the bumper constructed—what was it made of?——

I will ask to have this marked as Plaintiff's Exhibit No. 1 for identification.

(The photograph referred to, was marked as Plaintiff's Exhibit 1 for identification.)

By Mr. Richter:

Q. This is a photograph of the Port Richmond yard looking east from No. 2 track, which is the track involved in this case, and I ask you to look at the end of track No. 2, and ask you whether that is to top of the bumper, that sets up like the side of a tripod?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. Now, looking farther east, beyond the tripod, what do you have?

A. A slope.

Q. How high is that from the level of these tracks down to the slope where the road runs below?

A. 28 feet.

Mr. Richter: May I show this to the jury, Your Honor?

The Court: If it is to be offered in evidence?

Mr. Richter: Yes, I offer it in evidence.

(The photograph referred to, marked Plaintiff's Exhibit 1 for identification, was received in evidence, and is filed with these proceedings.)

[fol. 18] Mr. Richter: Members of the jury, this is a view of the yard, looking toward the river. If you will pass it around.

By Mr. Richter:

Q. What is alongside of the road below the level of the tracks?

A. There is the Shore Road for traffic along there.

Q. And then you have the Delaware River?

A. The Delaware River, that is correct.

Q. Now, I believe you told us that you told Mr. Hinkle to set the brakes on the cars that you had just moved in?

A. That is right.

Q. What, if anything, had been done about the air hose on these cars?

A. The air hose were already coupled—they had air in them.

Q. Suppose you explain to us what the air hose is for, and where the air comes from?

A. The purpose of having air on is in case a drawhead would come out and the car breaks away, it would stop the cars.

Q. The air comes from the engine itself?

A. That is correct.

Q. After the cars are laying on the track for a while and disconnected from the engine what happens to the air that has been pumped into the cars?

A. Sometimes the air leaks off.

Q. It bleeds out?

A. It bleeds out.

Q. Is that the purpose of setting the brake, in case the air bleeds out?

A. That is the reason for putting the hand-brake on, in case the air-brakes loosen up.

Q. And the hand-brakes hold it independently?

A. That is right.

[fol. 19] Q. Did Hinkle go up and set the brakes?

A. Yes, he did.

Q. And what did you do after Hinkle had set the brakes?

A. I checked the train over, and I seen the brakes were not on.

Q. What did you do to check the train over?

A. I looked to see if there was any hand-brakes on, and I found a chain hanging——

Q. You say you found a chain hanging on a brake?

A. That is right.

By the Court:

Q. On which end of the cars—the front or the rear?

A. On the rear.

Q. On one car?

A. The hand-brakes were not on, and when I came to the car next to the rear you couldn't help seeing it.

Q. This is the second car that you examined?

A. No, it was about the fourth.

Q. The fourth?

A. The fourth or fifth car.

Q. I don't suppose it is important or material here where were the other four cars?

A. The other three cars, they were on the other end, that is, toward the river.

By Mr. Richter:

Q. What we want to know, had the brakes been set on the other cars?

A. Yes, the brakes had been set on the other cars.

The Court: All right.

[fol. 20] By Mr. Richter:

Q. And then you came to this one and you found the brake chain hanging?

A. That is right.

Q. And what did that mean?

A. It means the brake isn't on.

Q. Can you tell that way?

A. I can.

Q. And how would you know when the brake is set?

A. The chain is wrapped up around the—I don't know how to describe it——

Q. The shaft?

A. The shaft.

Q. And this brake chain was hanging down loose?

A. Hanging down.

Q. And what did you do?

A. I went up to put it on.

Q. Where does the man have to stand to set the brake?

A. Stand on the brake step—it is a platform, like.

Q. Which way do you face when you stand on the platform?

A. Face the engine.

Q. And what did you have with you at the time?

A. The lantern.

Q. And where was the lantern?

A. On my left arm.

Q. Suppose you describe to the jury just how you were standing, and what position your lantern was in, and what you were doing?

A. I had the lantern in this hand (indicating), and I got a hold of the handbrake——

Q. What does the lantern have—a handle?

A. Yes, a handle.

Q. And you had your arm through the handle?

A. Yes.

Q. And what were you doing?

[fol. 21] A. I was tightening the brake—it was kind of stiff and sticking—it was pretty hard to signal with the one hand and to get the brake on.

Q. With the ordinary brake wheel, do you have the difficulty that you had with this wheel?

A. Not ordinarily.

Q. What was the difference between this wheel and the ordinary wheel?

A. It was kind of stiff, and like a spring—like a shoe kicking back.

Q. And you started to try to set it?

A. That is right.

Q. Had you given any orders to anybody to move this train?

A. I had not.

Q. Had you given any permission to anyone to move this train?

A. No permission at all.

Q. Had you given any signal to move this train?

A. I did not.

Q. Go on, and tell His Honor and the members of the jury what took place while you were standing up there?

A. As I was tightening the brake—just that quick—I felt something like the slack being run out, getting ready to uncouple.

Q. What did you feel on your car?

A. A quick jar, and I took this hand to signal "stop." (Indicating.)

Q. What did you signal?

A. I signaled "stop" the best I could and hold on, but I went down; I lost my hold and down I went.

Q. What happened to the wheel on the hand-brake while you were holding the wheel?

A. That kicked back.

Q. What do you mean by that?

A. I was putting it on this way (indicating), and it kicked right back off.

[fol. 22] Q. Could you hold it?

A. No, I couldn't.

Q. Was it pulled all the way on?

A. Oh, no.

Q. What happened to you?

A. Down I went.
Q. Why did you swing the lantern?
A. To stop—I didn't know whether they were moving on——
Q. Anyway, whatever that move was that caused the jar, you tried to stop it?
A. That is right.
Q. You didn't want them to move?
A. I did not.
Q. How far did you go down?
A. I judge around 20 feet.
Q. How high, I mean, did you fall?
A. The height of the hopper, anyway.
Q. That car is about 12 feet high?
A. About 12 feet.
Q. And where is the brake step, or platform? Suppose I show you this photograph——
While this is not the car in question, it is one like it, Your Honor.
The Court: All right.
Mr. Richter: And may I have this photograph marked as Plaintiff's Exhibit 2?

(The photograph referred to was marked as Plaintiff's Exhibit 2 for identification.)

By Mr. Richter:

Q. Is that the type of car you were working on?
A. Yes,—I was standing here. (Indicating.)
[fol. 23] Q. And how far is that platform beneath the top level of the coal hopper?
A. About eight feet.
Q. About 18 inches?
A. Eight feet.
Q. I mean from the top of the car down to the platform step. All right, take it from here (indicating).
The Court: Just follow that through.

By Mr. Richter:

Q. From the top of the car down to the brake platform is about how far?
A. About 30 inches, I would say.
Q. I think you did say from the platform to the ground is about eight feet?

A. About that, yes, sir.

Q. What happened to you when you went down to the ground?

A. The thing happened that quick——

Q. Were you conscious or unconscious?

A. I don't know what happened, to tell the truth,—it happened that quick——

Q. Were you unconscious?

A. I was, yes, for about a second or so.

Q. More or less dazed?

A. Yes, that is what you would call it.

Q. Did you try to get up?

By the Court:

Q. Were you right at the end of the car,—you didn't fall down the slope?

A. I fell down from the step, on the draw-head, on the other side.

[fol. 24] Q. What was the approximate distance that you fell from your footing on the platform to the place where you were?

A. I would say about eight feet.

The Court: All right.

By Mr. Richter:

Q. Were you able to get up of your own strength and rise?

A. I was not.

Q. Were you able to continue working?

A. I was not.

Q. Who lifted you up?

A. I don't remember who really lifted me, to tell the truth.

The Court: The reason I asked, I didn't quite understand, a few minutes ago you said "I went down about 20 feet." Did you mean that, or did you want to correct that?

The Witness: No, I didn't mean that. I didn't get the question right.

By Mr. Richter:

Q. About eight feet, is that the right distance?

A. About eight feet, that is correct.

Q. Now then, they got you out from between the tracks?
A. Yes, sir.
Q. And where did they take you?
A. They took me home.
Q. You were ridden on the engine up to a certain point in the yard?
[fol. 25] A. To Thompson Street.
Q. And you were put in an automobile and taken home?
A. And taken home.
Q. Was there a physician called in to see you that night?
A. Yes, there was.
Q. How did you feel that night, Mr. Myers?
A. I felt terribly sore.
Q. In what part of your body?
A. Especially my back and lower spine.
Q. And how about your hand?
A. My hand was bruised in several places and sore all over, to tell you the truth.
Q. That was on your left hand?
A. That is right.
Q. Were you able to sleep that evening?
A. I didn't sleep at all that evening.
Q. How did you feel the following day? Were you able to go to work?
A. I wasn't; I felt worse the next day.
Q. Within a few days, did you come under the care of Dr. Gayl?
A. I did.
Q. Where is Dr. Gayl's office?
A. He is located on Broad Street,—3100 North Broad.
Q. Did Dr. Gayl come to see you first?
A. Dr. Gayle came to see me.
The Court: How do you spell that?
Mr. Richter: G-a-y-l.

By Mr. Richter:

Q. And did you, thereafter, go to Dr. Gayl's office for treatment?
A. Afterward.
[fol. 26] Q. What kind of treatment?
A. Baking, and spine massage.
Mr. Heebner: Will you keep your voice up,—I can't hear.

The Witness: He was baking my back, my spine, and massage treatment,—whatever you call it.

By Mr. Richter:

Q. Then you were under the care of Dr. Gayl for several weeks?

A. That is right.

Q. And then what happened on July 1,—where were you sent?

A. I went to St. Joseph's Hospital, Dr. Lefkoe.

Q. It was Dr. Gayl who referred you to Dr. Lefkoe, who is an orthopedic surgeon?

A. That is right.

Q. At that time, what did he do?

A. Dr. Lefkoe said that I must go in the hospital——

Mr. Heebner: I object to that,—what the Doctor said. He went to the hospital.

By the Court:

Q. He went to the hospital, and Dr. Lefkoe directed you to go there?

A. Yes, sir.

The Court: Strike out the word "must"

Mr. Richter: All right.

[fol. 27] By Mr. Richter:

Q. And you were in St. Joseph's Hospital how long?

A. I was there 11 days.

Q. You were under the care of Dr. Lefkoe there?

A. Yes, sir, that is right.

Q. And what did he do for you?

A. They gave me some treatments and put weights on my feet.

Q. Were you lying in bed?

A. I was lying in bed.

Q. Describe how they set these weights on your feet or legs?

A. The bottom of the bed was raised up, and weights on my feet hanging down over the bed.

Q. The weight was pulling the feet over?

A. Over the bottom of the bed.

Q. Did that give you relief?

A. A little relief for a while.

Q. And what happened to the finger in the interim?
A. They were baking that——
Q. What happened to it?
A. It swelled up.
Q. Were you able to bend it?
A. I was not able to bend it,—it stayed in one position.
Q. What do you mean it stayed in one position?
A. It stayed like that. (Indicating.) I couldn't bend it straight.
Q. Are you able to bend it out straight now?
A. Not very straight, no.
Q. Can you bend it like the comparable finger on the other hand?
A. Not the same finger, no.
Q. After you came out of St. Joseph's Hospital sometime in the middle of July, how did you feel at that time?
A. I felt pretty bad, to tell you the truth; my back was [fol. 28] still bothering me, and also the spine—there was pain there,—I couldn't hardly stand it.
Q. Were you able to sleep at night?
A. No, I wasn't able to sleep.
Q. Were you able to do any lifting?
A. No, I couldn't lift anything.
Q. Could you do any bending?
A. No.
Q. Or were you able to twist?
A. No, I couldn't,—no exercise of any kind.
Q. Did you return to the hospital?
A. I did; I went back to the hospital for treatment.
Q. Were you feeling any improvement in your condition?
A. No, I was suffering miserably with my back and spine.
Q. What part of your spine was involved?
A. My lower part.
Q. That would be in the sacro-iliac?
A. In the lower part.
Q. Mr. Myers, did you try to go to work sometime in the early part of September?
A. I did.
Q. Where did you try to go to work?
A. I took a job with the P. T. C.
Q. Doing what?

A. Motorman.
Q. Driving a trolley car?
A. That is right.
Q. While you had been working every day at the Reading Company, seven days a week, twelve hours a day, were you able to work six days for the P. T. C.
A. I was lucky to work two days a week.
Q. Was there plenty of work?
A. Yes, there was plenty of work.

[fol. 29] By the Court:

Q. How many days did you work?
A. Two or three days, at the most.

By Mr. Richter:

Q. While you were working for the Reading Company, what was your average weekly pay?
A. We got paid twice a month, every fifteen days, and it would run around $250 or $240.
Q. For 15 days?
A. That is correct.
Q. That would be somewhere in the neighborhood of anywhere from $120 to $125 a week that you were earning with the Reading Company?
A. Yes, sir.
Q. And what was your average weekly pay at the P. T. C.?
A. I might earn $35 or $30, that is what you could make; but I only ran around $16.00.
Q. In other words, you were only paid for the time you were there?
A. For the time I worked.

By the Court:

Q. And how much was that?
A. About $16.00 or $20.00 was the most, Judge.

By Mr. Richter:

Q. What was the reason you didn't work a full week,—you say you were unable to work?
A. That is correct.
[fol. 30] Q. Why did you take this job of motorman, just sitting there and moving those handles around?

A. This dull pain annoys me——

Q. What do you mean by the dull pain—why was your work doing that?

A. I had to sit there or stand, and I couldn't stand the pain, and I just had to knock off.

Q. What happened after you would sit there or stand there for a while?

A. I got cramped up, and I couldn't move,—I could hardly get up.

Q. Mr. Myers, did you make an effort later on to try to do some railroading?

A. I did.

Q. With what company?

A. The Pennsy.

Q. What kind of job did you get?

A. Job as fireman for two days, I lasted, that's all.

Q. Tell the jury what happened after the two days?

A. I tried to fire an engine,—I just couldn't bend and shovel coal to throw it in the engine.

Q. What effect did it have on you when you got home?

A. I felt like I was "all in,"—I don't know how to explain it.

Q. And caused you to be laid up?

A. I was all stiff and sore, and my back started aching me, and my spine, the pain came back.

Q. And thereafter you went back to the P. T. C.?

A. I couldn't sleep,—I was so bad.

Q. What happened after you got to bed at night?

A. I never can sleep since that happened, very good,—up and down all night.

Q. And why?

A. Because I got that dull pain that annoys me; I can't get my proper rest,

[fol. 31] Q. What does this pain do to you,—can you describe it for us a little better?

A. I can't explain just what it is that just seems to be bothering me,—like something hit me, or someone,—it is like a knife jabbing you,—constant dull pain. If I do any lifting or bending it gets worse.

Q. Did you subsequently go for observation to Dr. Jepson?

A. I did.

Q. Dr. Jepson and Dr. Lefkoe are associated in the hospital?

A. That is correct.

Q. Did Dr. Jepson prescribe any special kind of appliance or belt for you?

A. He prescribed a special belt for me to wear.

Q. And on what part of your body do you wear that? A. Across the back of the lower spine. I have it on now.

Q. What did he recommend in the way of a special bed for you?

A. I had to get a—it is called compo——

Mr. Heebner: I think that the Doctor ought to testify as to that.

The Court: Oh, he can tell us what he did,—you are going to call the Doctor?

Mr. Richter: Certainly.

The Court: Well, I think he can tell us what he did.

Mr. Heebner: I have no objection to him describing what he did.

[fol. 32] By Mr. Richter:

Q. You have the belt on?

The Court: Yes, he said he had it on now. You are asking about the bed.

Mr. Richter: Yes, I forgot about that.

By Mr. Richter:

Q. What did he tell you to do with the bed?

A. To get this here compo board——

The Court: I don't understand——

Mr. Richter: Compo board.

By Mr. Richter:

Q. And did you receive a prescription from the Doctor in regard to special shoes?

A. I got a prescription for special shoes.

By the Court:

Q. Do you use special shoes?

A. No, I never used them before.

Q. Are you using them now?

A. Yes.

Q. You said you got a prescription, and I didn't know whether you had the prescription filled.

A. I did, but I haven't got the shoes yet.

[fol. 33] By Mr. Richter:

Q. Has your finger improved a great deal?

A. Yes, my finger has.

Q. Well, is it now like the other?

The Court: He already said all that,—don't repeat that.

Mr. Richter: All right.

By Mr. Richter:

Q. Now, what is the rule of the Company about what notice or warning must be given before a train is moved?

A. Must ring the bell or give a sound with the whistle.

Q. Was there any such bell rung or whistle sounded before this train was moved?

A. There was not.

Q. Were you in a position where you would have heard it if it had rung?

A. I would have heard it.

Q. What is the rule in regard to men, before moving a train, or giving the signal to move a train, as to where the other members of the crew are?

A. You must know where everyone is of the crew before you move.

Q. And you say you had never given the signal or authority to move the train——

The Court: Yes, he said all that.

Mr. Richter: Cross-examine, please.

[fol. 34] Cross-examination (N. T. pp. 32-43 inc.).

By Mr. Heebner:

Q. Mr. Myers, as I understand it, the locomotive was pushing a draft of seven cars in No. 2 track, toward the river?

A. Yes, sir.

Q. And there were three cars next to the bumper to which these seven were to be pushed?

A. That is right.

Q. When that draft of seven cars was being pushed toward these three cars, where were you standing,—where were you,—were you on the ground or on the draft?

A. I was on the ground.

Q. You wer etween track 2 and track 3?

A. That is right.

Q. After the cars came together, the seven car draft, they were coupled to the three car draft, and then that entire draft of ten cars were stopped, is that right?

A. That is right.

Q. And this is the time that you directed Hinkel to set the brakes on the cars next to the river?

A. That is right.

Q. At the east end,—did you do anything else with respect to any of the other cars in the draft?

A. No, I did not,—only down on the fifth car I seen the brake off.

Q. When the draft of seven cars and the draft of three cars came together where were you with respect to the draft of ten cars?

A. I was on the ground.

Q. Just where, roughly?

A. Somewhere in between the train, alongside.

Q. Between track 2 and track 3, about opposite what car in the draft of the ten?

[fol. 35] A. I don't just recall, to tell the truth.

Q. Were you about in the middle?

A. Somewhere about the middle.

Q. The fifth or sixth car, would you say?

A. That is right.

Q. Were you on the north side of the draft of the ten cars?

A. The north side, yes.

Q. And where was Hinkle when the coupling was made?

A. He was on top.

Q. Of what car?

A. On the hind car.

Q. You mean on the car next to the engine?

A. The seventh car, that would be the hind end.

Q. The hind end,—is that the end far from the engine?

A. The end far from the engine.

Q. He was on the leading end of this particular movement on that track come in,—he was on the leading car as it was being pushed toward the three cars?

A. Yes.

Q. And where was Kelleher at the time the coupling was made?

A. On the front end next to the engine.

The Court: That is the rear end in the way it was being pushed. The front end is farther from the river?

The Witness: That is right.

The Court: But this was the last car that was being pushed?

The Witness: Yes, that would be the hind end.

The Court: Yes.

[fol. 36] By Mr. Heebner:

Q. So that the locomotive which was headed south, or east, whichever you call it,—headed toward the river——

A. Headed east.

Q. That put the engine man, or whatever you call the man who operates the Diesel engine, on the west or south side of the track?

A. That is correct.

Q. He would be on the right side of the engine and the fireman on the left?

A. On the left.

Q. And when you make a move around a curve in passing signals do you stand or place yourself on the inside or on the outside of the curve?

A. On the side where we are working,—the inside.

Q. When you push a bunch of cars around a curve to the left, the men take their position on the inside of the curve?

A. Correct.

By the Court:

Q. You are not on the side that the engine man is on, then?

A. You would be on the fireman's side.

By Mr. Heebner:

Q. You would be on the fireman's side on this particular move?

A. That is correct.

Q. You were on the ground and Kelleher was on the car next to the engine?

A. That is right.

Q. Was he on top?

A. He was on top.

[fol. 37] Q. Were they loaded coal cars?

A. All loaded coal cars.

Q. And Hinkle was on the car next to the river?

A. That is right.

Q. Of the seven that were being pushed?

A. On No. 7 car.

Q. And where was Kiernan, the other brakeman?

A. There was no other.

Q. I beg your pardon,—he is the fireman,—you said you had a lantern,—it wasn't dark yet?

A. It was almost dark,—it wasn't very light.

Q. You could see both ends of the draft,—you could see the locomotive?

A. That is right.

Q. And you could see the car nearest the river?

A. You could just about see the shape of it.

Q. And could you see Hinkle from where you were?

A. Yes.

Q. And could you see Kelleher?

A. Yes.

Q. He was on the first car next to the engine?

A. Yes.

Q. You had not actually started passing signals by means of lanterns at that time?

A. No, they had been passing hand signals, without lanterns.

Q. Neither one of them had a lantern, as a matter of fact?

A. They did not.

Q. When the draft stopped, then you walked in which direction?

A. I walked east.

Q. That is toward the river?

A. Toward the river.

Q. And what did you do with respect to these cars?

A. Looked to see if they were secured good enough.

[fol. 38] Q. By that you mean to see whether the hand-brakes were applied?

A. That is right.

Q. And you found one car on which the hand-brakes had not been applied?

A. That is right.

Q. And that was which car in that draft?
A. About the sixth car.
Q. The sixth car from the engine, is that right?
A. That is correct.
Q. The brake was on the river end of that car?
A. Yes, the river end.
Q. And you climbed up to the brake step to set the brake yourself?
A. I did, yes, sir.
Q. What kind of a brake was it?
A. The regular hand-brake.
Q. What make,—what kind?
A. I don't know the name of the make, but it was a regular hand-brake.
Q. And you applied that brake, and after you applied the brake, then what did you do?
A. I didn't do anything after I put that brake on,—that is when I got knocked down.
Q. While you were there this move was made, you say?
A. That is right.

By the Court:

Q. Do you know where Hinkle was at that time?
A. Hinkle was down already,—he came down and started walking toward the front end, toward the engine.

By Mr. Heebner:

Q. Which way do you mean, by the front?
[fol. 39] The Court: Toward the engine.
The Witness: Toward the engine,—walking west.

By Mr. Heebner:

Q. Had he passed you on his way to the engine?
A. That is correct.
Q. Or was he between the river——
A. No, he passed me going back.
Q. He passed you going back?
A. Yes, sir.
Q. And where was Kelleher?
A. Kelleher was back toward the engine.
Q. Was he still on the car?
A. No, he got down.
Q. Both Kelleher and Hinkle were on the ground?

A. That is right.

Q. Kelleher was still opposite the car next to the engine, on the ground?

A. That is right.

Q. Which way did the train move while you were applying this brake or while you were up there?

A. Rolled east, toward the river.

Q. You say it rolled east toward the river?

A. Yes, moved east.

Q. Did the locomotive actually move at all?

A. Well, in my estimation——

Q. No, did the locomotive move?

A. Yes, the train did move.

Q. The locomotive and all the cars between the locomotive and the car you were on moved?

The Court: I don't suppose he could see the locomotive.

[fol. 40] Mr. Heebner: Yes, he said he could see the locomotive.

The Court: You better first ask, did this car move?

The Witness: The car I was on did move.

By the Court:

Q. And about how far?

A. Just moved to give a jar, and I let go with one hand to swing "stop,"—I didn't know whether they were going to start to back up or what was going to happen.

The Court: All right.

Mr. Heebner: I didn't hear you say how far?

The Court: Just far enough to jar.

Mr. Heebner: Just far enough to jar?

The Court: I may be wrong, but that is what I understood.

By Mr. Heebner:

Q. And how far is that, one foot, three foot, or six feet——

A. I don't exactly know how far it was,—I didn't move.

Q. Did it continue moving, or did it stop?

A. It just started to move and I swung "stop,"—when the quick jolt came, and I was thrown down.

Q. You didn't know how far it moved?

A. No, I did not.

Q. All you know is that there was a jar, and the combi-
[fol. 41] nation of your operating of the brake and the jar, you say, threw you from that car?

A. That is right.

Q. But the car was moving toward the river when it moved?

A. That is right, that would be toward the river.

Q. In answer to a question Mr. Richter asked you, you said it was customary to ring the bell or blow the whistle before a movement of this kind was made; you didn't mean that it was customary to blow the whistle in shifting movements in a yard?

A. Yes, if you don't know where the other men are, to notify them you are going to move, in my estimation, it would be,—yes.

Q. And you were on top of this car?

A. I was.

Q. There was nothing to prevent anybody from seeing you up there, you knew where Hinkle was and where Kelleher was?

A. That is right,—but I didn't know they were going to move; I would have to have warning to hold on.

Q. Do you mean to say under the circumstances it is customary, and the Company's rule, to blow the whistle before the locomotive moves a draft of cars?

A. Yes, I would say it is.

Q. It is customary to ring the bell,—that is your statement? That it is customary to blow the whistle before——

A. Ring his bell.

Q. Is it customary for the whistle to be blown?

A. Before the locomotive starts, yes.

Q. In the yard when you are shifting cars around, classifying them?

A. It is customary to do both; maybe there would be certain locomotives with cars, and you wouldn't hear the bell.

Q. When you have seven cars moving against a draft
[fol. 42] of three, you want us to believe that the rules of the Company require that the whistle be blown before the locomotive can move with any of these cars?

A. You need to ring the bell.——

Q. Just answer my question,—is that the rule?

Mr. Richter: Just a minute——

The Court: Now, wait a minute. I don't think he said that—I understood him to say it in the alternative, either the bell or the whistle.

Mr. Heebner: I didn't understand it that way.

The Court: That is what I understood,—I may be wrong. I think he said they must blow the whistle or ring the bell.

The Witness: That is correct.

Mr. Heebner: That is all I want to know.

By Mr. Heebner:

Q. All I want to know is whether it is customary to blow the whistle in making classification movements where you are pushing two or three cars in the yard, and where there are hundreds of other cars and the same thing is being done by other locomotives,—it isn't customary to blow the whistle?

A. Yes, in some cases, according to what kind of movement you are making. If the engine wants to call for signals he would have to blow four short.

Q. When did you first go to work for the P. T. C.?

A. Sometime in September.

Q. In 1944?

[fol. 43] A. Correct.

Q. And you resigned from the Reading Company earlier that month?

A. On the last of August, I guess it was, or early in September.

Q. Or early in September?

A. I guess it was.

Q. How many weeks did you work for the P. T. C.?

A. I have been working for the P. T. C. since September, off and on.

Q. You started to work there about the month of September?

A. That is correct.

Q. And when did you stop there and go to work for the Pennsylvania Railroad?

A. I would say it was about in October.

Q. October of 1944?

A. October of 1944, yes.

Q. About the middle of October, the first, or the last of the month?

A. Why, about the middle of October,—I don't recall the date; it is only about two days.

Q. You worked for the P. T. C. over a period of a month, about?

A. That is correct.

Q. And you went to the Pennsylvania Railroad in the middle of October?

A. That is right.

Q. And how long did you work for the Pennsylvania Railroad?

A. Two days.

Q. Two days, as fireman?

A. As fireman, yes.

Q. Did you do any other work for the Pennsylvania Railroad?

A. No, I went back to the P. T. C. again.

[fol. 44] Q. When did you return to the P. T. C.?

A. Inside a week after that.

Q. Was that in October or November?

A. In October.

Q. In October?

A. Yes.

Q. And how long have you worked for the P. T. C.?

A. I have been working for them ever since, off and on.

Q. Since October?

A. Yes, sir.

Q. Is that where you are working now?

A. I am not working at all now,—that was only up to April.

Q. April of this year?

A. April of this year.

Q. What part of April?

A. I would say about the sixth of April,—the first week in April, about.

Q. You worked one week in April?

A. That is right.

Q. When you went to work on the night of June 11, 1914, where did you pick up the members of your crew that night?

A. Down the level, at Thompson Street.

Q. At the yardmaster's office there?

A. No, the yardmaster's office is over at Richmond Street.

Q. How did you know what you were supposed to do that night?

A. I got down to the yardmaster's office and got the orders.

Q. You had been there already?

A. Oh, yes.

Q. And then you went somewhere and picked up the crew?

A. We went down with the engine light.

Q. What is that?

[fol. 45] A. We went down with the engine light, we run down on the engine light to the yardmaster's office to get our orders.

Q. Did you assemble your crew before you went to the yardmaster's office?

A. That is right.

Q. What did your crew consist of?

A. You know, you have the engineer and fireman, and two brakemen.

Q. You had learned that the day before?

A. No, the same day, when you start.

Q. I understood you to say you rode the engine right to the yardmaster's office?

A. Yes, without pulling any cars.

Q. This same engine?

A. Yes.

Q. And that is where you picked up the orders?

A. That is correct.

Q. And that was about 6:00 o'clock?

A. Around 6:30, I guess.

Q. At that time you were feeling perfectly well?

A. I was.

Q. You made no complaint to anybody about not feeling well, feeling sick at your stomach or anything?

A. No.——

Q. It was a perfectly clear night, Mr. Myers?

A. Yes, it was a clear night.

Q. You didn't work any longer than two days for the Pennsylvania Railroad?

A. That is all.

Q. This photograph (indicating), at least shows track No. 1, track No. 2, and track No. 3?

A. And No. 3.

Q. With one car standing on the track,—what track number is that?

A. Three cars on track 3.

[fol. 46] Q. I beg your pardon,—that is right. And on track No. 1?

A. That is a clear track.

Q. And that is the one on the right as you look at the picture?

A. That is correct.

Q. And No. 2 is the middle one with the bumper there? (Indicating).

A. That is right.

Q. And that is the track on which this draft of seven cars was pushed to meet the three that were standing there?

A. That is right.

Mr. Heebner: I think that is all.

Redirect examination (N. T. pp. 48, 49).

By Mr. Richter:

Q. Just one question. Reading Company Rule No. 30 requires, does it not, that on shifting movement that the bell must be rung before the engine is moved?

A. That is correct.

Q. And the whistle, as I understand, is used when the train is so long that the bell might not be heard, or under special circumstances where you have to give certain toots?

A. That is right.

Q. And that is in order to pass a signal of some sort?

A. Correct.

The Court: All right. We will take a five minute recess at this time, members of the jury.

(Informal recess from 3:30 to 3:40 P. M.)

[fol. 47] Mr. Richter: If Your Honor please, for the purposes of the record the fact that this was in interstate commerce is admitted in this case.

The Court: Yes.

Mr. Richter: Will you take the stand, Mrs. Myers, please.

CATHERINE MYERS, having been duly sworn, was examined and testified as follows:

Direct examination (N. T. pp. 49-59 inc.).

By Mr. Richter:

Q. Mrs. Myers, you are the wife of the plaintiff?
A. That is right.
Q. You and your husband have three daughters, is that correct?
A. That is right.
Q. You are also employed by the Reading Company?
A. That is correct.
Q. What do you do there?
A. I am hired as helper.
Q. What do you do there, what kind of work?
A. Help on Diesel engines.
Q. You actually work right on the engine itself?
A. That is correct, passing signals.
Q. Are you familiar with the Port Richmond yard?
A. No, I ain't; I never been in that yard only a couple times, passing through cars.
Q. Do you know the rules of the Company in regard to operating engines and trains, and so forth?
[fol. 48] A. Yes, I do.
Q. You were not present when this accident occurred?
A. No, I was not; I was working at Noble Street.
Q. You are talking but nobody hears a word,—just talk slowly and speak clearly. You were not at home when this accident happened?
A. No, I was working for the Reading Company.
Q. Were you notified of the accident?
A. That is right.
Q. And what did you do?
A. They sent for me to come home right away, my husband was in a dangerous condition——
Mr. Heebner: I object to that, and move that the answer be stricken.
The Court: Yes, that may be stricken. Just tell us what you saw and did.

By Mr. Richter:
Q. You were brought home?
A. That is correct.

Q. See your husband when you got home?

A. That is right.

Q. Did you have an opportunity to note his body,—the different parts of the body?

A. No, I did not.

Q. Did you look at your husband to see if there were any marks?

A. No, the doctor was there.

Q. After the doctor left did you get an opportunity to look at him?

A. Yes.

Q. Tell us what you observed on his back, if anything? [fol. 49] A. He was scratched on the back, and the left hand was dislocated,—he couldn't move the fingers of his hand.

Q. Your husband had gone to work sometime that evening?

A. Yes.

Q. When had you last seen your husband before he went to work?

A. Three o'clock in the afternoon.

Q. Had your husband made any complaint to you about feeling unwell or anything?

A. No he didn't.

Q. Had you observed anything wrong with him?

A. No, he was working twelve hours a day.

Q. Had you observed anything wrong with your husband a day or two, or even a month before this happened?

A. No, I did not.

Q. What was the condition of his health for a period of at least a month prior to the date of this accident,—was it poor, fair, or good?

A. I would say his condition was good, because he was working twelve hours a day at that time.

Q. Had he made any complaint about feeling ill during that period of time?

A. No, he didn't.

Q. That night, after you came home and found your husband at home, where was he?

A. He was lying on the couch.

Q. Did you get him upstairs?

A. Yes, they had to carry him up; four men had to carry him upstairs.

Q. Four men?
A. That is right.
Q. They got him upstairs?
A. Yes, sir.
Q. Couldn't he walk up the steps himself?
A. No.
[fol. 50] Q. And then the doctor came?
A. That is right.
Q. After the doctor left, did you remain at home that night?
A. That is right.
Q. Was John able to sleep that night?
A. No, positively not.
Q. What, if any, complaint did he make?
A. Complained of his back and his hand.
Q. Suppose you describe or tell us what you observed about his hand?
A. His hand was all out of shape; his fingers were like they were numb.
Q. What were they like?
A. In this shape (indicating).
Q. You are showing your hand bent up?
A. Fingers were all like in this shape. (Indicating.)
Q. Did you take hold of his hand and try to straighten it?
A. Yes, but his hand still is out of shape.
Q. Could you pull the fingers straight?
A. No, I couldn't.
Q. And were the fingers swollen?
A. That is right, and all out of shape.
Q. Did you get an opportunity the following day to look at his back?
A. The doctor looked at his back later on that night, about 12:00 o'clock.
Q. And what did you notice about his back?
A. His back was something like as if it was scratched.
Q. And where was the scratch?
A. Down his spine,—down by his spine.
Q. Was it the upper part or lower part of the spine?
A. The lower part.
Q. You say it was scratched?
A. Scratched.
[fol. 51] Q. The following day did you notice any other marks on his back?

A. No.

Q. Was your husband able to go out and go to work the next day?

Mr. Hepbner: That is objected to. I don't know how she can testify what he could do.

By the Court:

Q. He didn't go to work the next day?

A. No, he didn't go to work for three months, Your Honor. I had to go to work,—I had to keep him.

By Mr. Richter:

Q. Now, your husband, thereafter, came under the care of Dr. Gayl?

A. That is right.

Q. What, if anything, did you have to do for your husband at home in the way of treatment?

A. I had to massage his back.

Q. Have any ointment of some kind?

A. Yes.

Q. And what did you do with the ointment?

A. Massage his back.

Q. How often did you have to do that, Mrs. Myers?

A. About two or three times a day,—each day.

Q. How long was it, to the best of your recollection, before the swelling went down on John's left hand?

A. It didn't go down at all,—it continued for three or four months.

Q. You are familiar with what his hands are like today?

A. His hands are still out of place,—his fingers are still out of place today yet.

[fol. 52] Q. Your husband is working now?

A. He has not worked no place just now.

Q. But until April he had a job with the P. T. C.?

A. That is right.

Q. How many days a week had he been working there?

A. He worked two days, sometimes three, and sometimes one day a week,—he averaged $19 one week, and another week $7, and another week he averaged $20, and another week he averaged $27.00,—that was all the money he had for one full week.

Q. Why didn't John work the full weeks during that period?

A. He complained to me he wasn't fit to work,—he told me he wasn't fit to——

Mr. Richter: No——

Mr. Heebner: No, that is objected to.

By Mr. Richter:

Q. No, what did you notice after that? That is what I want to know, that would explain why he wasn't able to work.

A. He is irritable about the home; he can't stand any noise that the girls make.

Q. And does he sleep at night?

A. He don't sleep,—he walks around in his sleep.

Q. How do you know that?

A. Because I come home when I get through work at 12:00 o'clock, and he is still up, and I ask why he wasn't in bed, and he would say——

The Court: No——

[fol. 53] Mr. Richter: No, you can't repeat any conversation under the rules of evidence.

By Mr. Richter:

Q. What was the condition of your husband's health, generally speaking, before this accident?

The Court: She already said it was good.

By Mr. Richter:

Q. Have you noticed any change in his personality or general demeanor at home?

The Court: She said that he was irritable.

By Mr. Richter:

Q. Was he irritable before this happened?

A. No.

Q. And what was his attitude toward the girls before?

A. His attitude,—his whole interest was in his home. He lost all interest, he is irritable, and can't stand anything, and I told you before,—he can't stand anything.

Q. Are you familiar with rule 30 of the Reading Company in regard to what must be done before an engine is moved?

A. Yes.

Q. What does that rule require?

A. Three short whistles.
Q. Whistle or bell?
A. Four short whistles.
The Court: She said three short whistles, and then she corrected it to four.

[fol. 54] By Mr. Richter:

Q. Four short whistles?
A. Yes, sir.

By the Court:

Q. For what?
A. Calling for signal.
Mr. Richter: That is not rule 30,—calling for signal.

By Mr. Richter:

Q. I am talking about rule 30, which speaks of——
Mr. Heebner: Don't tell her what it is,—you have the rule book.
The Court: You just asked whether she is acquainted with rule 30, and she said "yes." Now, what is rule 30, you asked, and she said that it was four short whistles.
Mr. Richter: I think she is in error.
The Court: If she doesn't know——
Mr. Richter: If you don't know, you don't know.
The Witness: I am not familiar with it.
Mr. Richter: All right, cross-examine.

[fol. 55] Cross-examination. (N. T. pp. 59, 60).

By Mr. Heebner:

Q. When did you start working for the Reading Company, Mrs. Myers?
A. Two years ago.
Q. Two years ago?
A. That is right.
Q. You are on the day shift?
A. No.
Q. You are on the night shift?
A. I wasn't,—it was the middle shift.
Q. What time did you go to work each day?
A. 4:00 o'clock in the afternoon,—4:00 to 12:00.
Q. To 12:00 at night?
A. That is right.

Q. Did you always work these hours?

A. No, I got a regular, steady job; I was on the extra work, and you are called out at different times.

Q. How long have you been on the regular job?

A. I would say four or five months.

Q. And your hours are from 4:00 P. M. to 12:00 midnight?

A. That is right.

Mr. Heebner: All right, I have no more questions.

Mr. Richter: That is all, thank you.

Mr. Richter: If Your Honor please, I think at this point we have exhausted what testimony I have to present at this time.

The Court: I would like to see the members of counsel before I excuse the jury.

[56] (Conference at side bar.)

The Court: Now, members of the jury, we will excuse you until 10:00 o'clock tomorrow morning. Do not discuss this case among yourselves, since you haven't heard all of the evidence, and don't allow anyone else to discuss it with you.

You may be excused now until 10:00 o'clock. Be in your places at 10:00 o'clock tomorrow morning.

(Whereupon at 3:55 o'clock P. M. an adjournment was taken to Wednesday, May 23, 1945, at 10:00 o'clock A. M.)

Philadelphia, Pa., May 23, 1945.

Before Hon. Guy K. Bard, J., and a Jury.

Appearances: B. Nathaniel Richter, Esq., for the plaintiff. Henry R. Heebner, Esq., for the defendant.

Second Day

Mr. Richter: With the permission of Your Honor I should like to recall plaintiff for a moment to introduce a rule here.

[57] The Court: All right.

Mr. Richter: Mr. Myers, take the stand a moment, please.

JOHN MYERS (recalled).

Direct examination (continued) (N. T. pp. 62, 63).

By Mr. Richter:

Q. I show you a book that is marked "Property of the Philadelphia and Reading Railway Company", and ask you if this is a book that you own?

A. That book belongs to my wife.

Mr. Richter: May I have this identified, if Your Honor please.

(The book of rules referred to was marked Plaintiff's Exhibit 3, for identification.)

Mr. Heebner: May I take a look at it?

Mr. Richter: Yes, it is the usual rule book, Mr. Heebner.

(Counsel examines same.)

By Mr. Richter:

Q. Now, is this or is this not the book of Company rules for operating trains that is provided for each man who works on freight trains?

[fol. 58] A. That is right.

Q. Will you be kind enough to read rule 30?

A. Rule 30:

"The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade."

Q. Now, will you read rule 31?

A. Rule 31:

"Whistle must be sounded at the places where required by rule or by law."

Q. I believe you said yesterday that it was sometime in October that you had been with the Pennsylvania Railroad; did you want to correct that for us?

A. According to my recollection it was February.

Q. It was in February that you had gone to the Pennsylvania Railroad rather than in October?

A. Yes, sir.

Q. Had you, thereafter, for a short time also had a job as watchman?

A. Patrolman.

Q. Patrolman, that is for a week or so?
A. About one week.
Mr. Richter: Cross-examine.

Cross-examination (N. T. pp. 63-68, inc.).

By Mr. Heebner:

Q. Is that the first that you worked for the Pennsylvania Railroad, February, 1945?
A. February, 1945, that is correct.
Q. In what capacity did you work first with the Pennsylvania Railroad?
A. Fireman.
Q. Fireman?
A. That is right.
[fol. 59] Q. And how long did you work at that?
A. Why, several days, off and on.

By the Court:

Q. "Several days off and on"? Yesterday you said it was two days.
A. It was two days at first.

By Mr. Heebner:

Q. Did you work as fireman after that?
A. No, I went back as patrolman.
Q. When did you start to work as patrolman?
A. I believe it was sometime in April, the first or second week in April,—I just don't recall the day.
Q. You ceased to work as fireman on what date?
A. I don't recall the date.
Q. When did you start to work in February, the first of the month, the middle of the month, or the end of the month?
A. About the middle of February, I suppose.
Q. When?
A. About the middle of February.
Q. You worked for the Pennsylvania Railroad as fireman for two days and then you didn't work for the Pennsylvania Railroad until April?
A. Yes,—patrolman.
Q. And what part of April?
A. About the second week, I judge.
Q. That is just this past month?

A. That is correct.
Q. As patrolman?
A. That is right.
Q. And what were your duties as patrolman?
A. Why, just walking around and seeing that there was no seals broken, and protecting property.
[fol. 60] Q. Did these duties take you in the freight yards?
A. Yes.
Q. Did it confine you to freight yards, or did you go elsewhere in the performance of your duties as patrolman?
A. Everywhere they would send me.
Q. Where were you sent while you were working as patrolman?
A. Where was I sent?
Q. Where did you work as patrolman?
A. 44th and Girard Avenue.
Q. Is that the only place you worked as patrolman?
A. That is the only place, yes.
Q. That started in April and lasted how long?
A. About six days.
Q. Six days?
A. Yes, sir.
Q. Six days right in a row?
A. Yes, six days,—two days at one time, and then I worked three days after that.
Q. And what did you do after that, resign?
A. Yes, sir.
Q. When did you resign?
A. At the end of that week.
Q. The first week?
A. That is right.
Q. And you haven't worked since?
A. I have not worked since, no.
Q. What did you do between October, 1944, and February of 1945,—did you work at all during that period?
A. I worked off and on for the P. T. C.
Q. You worked off and on for the P. T. C. from the time you started there in September——
A. No, not until October.
Q. And until you went to the Pennsylvania Railroad in February?

A. That is right.

Q. Did you resign from the P. T. C.?

[fol. 61] A. Yes, I resigned from the P. T. C.

Q. When did you resign from the P. T. C.?

A. Why, about the last of March, I judge,—the first week of April, sometime,—I don't recall the date.

Q. That is after you started to work for the Pennsylvania Railroad?

A. No, I worked for the Pennsylvania Railroad and went back to the P. T. C., and I resigned the last week in March or the first week in April,—I don't know just what dates, and went with the Pennsy.

Q. So that after you stopped your work for the Pennsylvania Railroad as fireman you went back to the P. T. C.?

A. That is correct.

Q. And you worked for the P. T. C. from about the middle of February until when?

A. Up until about the last of March or first week of April.

Q. And then you went back to the Pennsylvania?

A. That is correct.

Q. You are not working anywhere now?

A. No, I am not, no, sir.

Q. Mr. Myers, will you read rule 32? You read rule 30 and 31 of the operating rules.

A. Rule 32:

> "Unnecessary use of either whistle or the bell is forbidden."

Q. Those rules apply to movements in yards, is that right? When you make up trains or are classifying cars,—the rules apply to work done in classifying?

A. Not according to the rules, no, sir.

Q. What is that?

A. Not according to the rules.

Q. These rules do not apply in those instances?

A. This last rule I just read isn't.

Q. What is that?

A. This last rule doesn't read that way,—it just says the unnecessary use of either the whistle or the bell is forbidden.

[fol. 62] Q. That applies to the same condition as rule 30 and the rule 31 applies?

A. That is correct.

Q. All three rules apply to movement in classification yards?

A. That is right.

Mr. Heebner: I think that is all.

Redirect examination (N. T. pp. 68, 69).

By Mr. Richter:

Q. Mr. Myers, you entered, actually, the Pennsylvania Railroad employ on the 21st of February, 1945?

Mr. Heebner: Oh, no,—if Your Honor please, the witness has already testified to that, and I object to Mr. Richter putting words in his mouth.

The Court: Just a minute.

By the Court:

Q. Do you know when you did start?

A. I don't just recall the date, Your Honor.

The Court: He gave conflicting testimony. He said he went there about the middle of February, and then you asked him on cross-examination about the middle of February if he went to the P. T. C. and he said "yes". Now, I don't know—he says now he doesn't know exactly.

Mr. Richter: I will put in the record of his employment, which will be the best proof. His memory may not be accurate on that.

That is all.

[fol. 63] The Court: All right.

Mr. Richter: Dr. Gayl, will you come up, please.

Dr. Joseph C. Gayl, having been duly sworn, was examined and testified as follows:

Direct examination (N. T. pp. 69, 70, 71).

By Mr. Richter:

Q. Now, Dr. Gayl, you are a practicing physician?

A. Yes, sir.

Q. And where is your office?

A. 136 North Broad.

Q. Of what school are you a graduate?

A. Harvard, 1929.

Q. Doctor, in the course of your practice, did you have occasion to examine and treat John J. Myers, the plaintiff in this case?

A. Yes.

Q. Will you tell us when it was, and where it was, you first saw him?

A. I saw him at his home on June 12.

By the Court:

Q. Last year?

A. 1944, yes, sir.

By Mr. Richter:

Q. At that time, will you tell us what his condition was?

A. I found him in bed complaining of pain in the back. On examination I found he had a lame back——

[fol. 64] Q. Did you receive any history from him?

A. Yes, he stated he had fallen off a freight car.

Q. Did you see him again thereafter?

A. Yes, he came to my office subsequently, between the 12th of June and the end of June on about six occasions.

Q. What did you have to do for him?

A. I gave him some electric heat treatment, diathermic treatment, strapped his back, and gave him some sedative for his pain.

Q. Was he in severe pain?

A. Not terrible severe, but uncomfortable.

Q. Did he respond to the treatment he was receiving?

A. He seemed not much.

Q. What did you do then?

A. I sent him to the orthopedic clinic at St. Joseph's.

Q. Did he receive additional hospital treatment?

A. That is correct.

Q. What is the bill for your services, Doctor?

A. $21.

Mr. Richter: Cross-examine.

Cross-examination (N. T. pp. 71-72).

By Mr. Heebner:

Q. Did he complain of anything else beside his back?

A. Not to my knowledge.

Q. Did you make an examination of other parts of his body?

A. I checked the blood pressure, lungs, and heart, and made a routine examination, but I was primarily concerned with his back.

Q. Did he appear to you to be excessively tired or exhausted?

A. No, he was thin and nervous.

Q. There wasn't any abrasion on his body?

[fol. 65] A. I don't recall,—I don't recall whether there was or not.

Q. If there had been you would have had a notation of it, in view of the history?

A. We like to have it, but sometimes a year later we don't always remember.

Q. Did you make a record of what you saw?

A. Yes, I did. This was the house call, and by the time you get back to the office,—things are quite hectic these days, and you can't always get things down.

Q. There wasn't anything that you recall now outside of his back that required medical attention?

A. There wasn't anything strikingly outside of that, that would focus my attention on it.

Q. Did he make any complaint to you about his left hand?

A. No.

Mr. Heebner: All right, Doctor.

Mr. Richter: That is all, Doctor, thank you.

Mr. Richter: Now, I have an affidavit of the Pennsylvania Railroad that I wish to offer in evidence.

As I understand, the Company for some reason or other believes that this affidavit can be offered in evidence rather than providing a witness. We subpoenaed a witness and they sent this to the clerk of the court.

I don't know whether Mr. Heebner is going to object or not.

Mr. Heebner: That is rather a unique way of proving——

Mr. Richter: I think it is, too.

Mr. Heebner: I would rather look at it, first.

[fol. 66] (Examines same.)

If Your Honor please, I assume that if anybody were brought down from the railroad to testify that that is what the records would show, and so I have no objection.

The Court: All right, if there is no objection it may be received.

Mr. Richter: The affidavit indicates, if Your Honor please, that Mr. Myers——

The Court: You may just read it to the jury as it is. Don't interpret it. That is a letter from whom?

Mr. Richter: This is a letter from the Pennsylvania Railroad, Treasury Department, addressed to the District Court of the United States, Eastern District of Pennsylvania, Ninth and Chestnut Streets, Philadelphia, Pa., and it is dated May 19, 1945, attention George Brodbeck, Clerk.

Dear Sirs:

In reference to subpoena served at this office today in case of John Myers vs. Reading Company, answerable May 21, 1945:

On account of the inconvenience of producing voluminous pay roll records in court, it is the practice of this Company to answer subpoenas in civil cases by letter affidavit, which is usually found to be satisfactory to the courts.

We accordingly advise that John Joseph Myers, Social Security Number 181-10-7008, born Philadelphia, April 16, 1905, residing 4248 N. 6th Street, Philadelphia, entered the service of The Pennsylvania Railroad Company as Fireman February 21, 1945, and resigned March 20, 1945. During this employment his supervising officer was F. E. Boehm, Road Foreman of Engines.

This man was re-employed April 24, 1945, as Patrol-[fol. 67] man, and again resigned May 1, 1945. His supervising officer during this employment was D. E. Roberts, Captain of Police.

During employment his earnings were as follows:

	1st half		2nd half	
	Gross	Net	Gross	Net
February	(Not employed)		$35.57	$34.11
March	$56.42	$53.13	No earnings	
April	(Not employed)		$43.12	39.53

Yours very truly,

J. Pemberton, Jr., Assistant Treasurer.

Mr. Richter: The gentleman from the P. T. C.

FRANK C. WILGUS, having been duly sworn, was examined and testified as follows:

Direct examination (N. T. pp. 75, 76).

By Mr. Richter:

Q. Mr. Wilgus, will you tell us by whom you are employed?

A. Philadelphia Transportation Company.

Q. In what position?

A. Assistant Supervisor of the Payroll Department.

Q. Do you have with you and have you brought into court at my request the record of the employment of the plaintiff in this case, John Myers?

A. Yes, I have.

Q. Will you tell us on what date he entered the employ of the P. T. C.?

A. He started as a student on September 2, 1944, and he [fol. 68] qualified and started working on his own on October 2, 1944.

Q. And will you tell us what the final date of his employment was?

A. He resigned May 7, 1945.

Q. Can you give the average weekly earnings during that whole period?

A. The average over that period covered is $22.45 per week.

Mr. Richter: Cross-examine.

Cross-examination (N. T. pp. 76, 77, 78).

By Mr. Heebner:

Q. Does your record show, Mr. Wilgus, how many day's a week he worked?

A. I have that for 1945, but I do not have it for 1944.

Q. Did he work every week from January until the time he resigned?

A. He had earnings during the weeks ended January 6, 1945, January 13, January 20, and January 27; the week ending March 24, and March 31; April 7, 14, and 21; nothing in between.

By the Court:

Q. Well, now, when you figured the average, you figured

the average on the weeks that he worked, or did you include the whole time from October 2 until May 2?

A. That included, sir; the 36 weeks involved, from the beginning.

Q. I think you just said he didn't have any earnings from February 1 to March 20?

A. That is right.

[fol. 69] Q. Well, now, did you count those weeks to get the average?

A. In dividing, the total 36 weeks from one end of the period to the other was used.

Q. It includes the weeks from February 1 to March 20?

A. Yes, sir.

Q. Well, now, do you have the average for the weeks that he actually worked?

A. No, sir.

Q. Well, how much did he earn the first week in January?

A. The week of January 6 he earned $32.25.

Q. And the next week?

A. The week ending January 13, he earned $46.71.

The week ending January 20, $53.72.

Q. And the next week?

A. The week ending January 27, $7.16.

Q. Now, the week ending January 20, when he earned $53.72, how much time does that involve?

A. During that week, 61.85 hours.

The Court: All right, Mr. Heebner.

By Mr. Heebner:

Q. What was the total wages paid to him while he was employed by the Company?

A. $808.33.

Q. Is that gross or net?

A. That is gross.

Q. That was the entire period from the time he started until the time he resigned last?

A. Yes, sir.

Mr. Heebner: That is all.

[fol. 70] Redirect examination (N. T. pps 78, 79, 80).

By Mr. Richter:

Q. Your total was $808.33 for the whole time he was with your Company?

A. Yes, sir.

The Court: And what is the gross on the Pennsylvania Railroad? I have the net.

Mr. Richter: $53.11, $34.11, and $39.53; a total of $127.75. That makes a total of $935.00.

The Court: I have $126.74 net, from the figures that you read.

Mr. Richter: Maybe I read them wrong.

The Court: What is the gross for that?

Mr. Richter: $56.42, $35.57, and $43.12.

Mr. Heebner: That is right.

The Court: That makes more than $127.75——

Mr. Heebner: $135.11, I make it.

Mr. Richter: All right.

The Court: That is what I make it, $135.11.

Mr. Heebner: All right.

[fol. 71] Mr. Richter: $943.44 for both,—altogether,—for the 36 weeks, Your Honor.

The Court: All right.

Any other questions?

Mr. Heebner: No, sir.

Mr. Richter: That is all I have.

I think it makes an average of $25.40 for the whole 36 weeks,—$25.43.

By the Court:

Q. Mr. Wilgus, I don't suppose you know why he worked, for instance, 61 hours on January 20 for that week, and the following week just a comparatively few hours?

A. No, sir, I would not know why.

Q. You have nothing to do with employing the man,—you just have the payroll?

A. That is true.

By Mr. Richter:

Q. May I look at that sheet, Mr. Wilgus? (Examines same.) He has had weeks running from $16.00, let us say, weeks of $20, $25, and in November, $29, and $28.—he had weeks that run very small amounts?

A. Yes, sir.

Mr. Richter: All right, that is all, thank you.

Mr. Richter: Dr. Tomlinson, please.

[fol. 72] DR. GEORGE MILTON TOMLINSON, having been duly sworn, was examined and testified as follows:

Direct examination (N. T. pp. 80, 81, 82).

By Mr. Richter:

Q. Dr. Tomlinson, you are a graduate physician?

A. I am.

Q. And licensed to practice in Philadelphia?

A. Yes, sir.

Q. For how many years, Doctor?

A. Since the fall of 1909,—36 years.

Q. Now, Doctor, did you have occasion to examine Mr. John Myers?

A. I did.

Q. What date was that?

A. June 11, 1944.

Q. Where?

A. At his home.

Q. What did you observe at that time?

A. Well, I might say,—I would like to give a sort of an introductory,—the reason I came in, I was called to his home, 4248 North 8th Street, and there was present there the gentleman that I see behind you and Mr. Myers, and present also were several men from the Reading Railroad who had brought him to his home in an automobile, stating that they had found him between the tracks on the railroad.

I examined him and found that he was quite dazed. He was also very weak; the man presented a sub-normal condition, and on examination of him, why, I found that his pulse was sluggish,—he was in a subnormal condition wherein his skin was cool. Of course, the man as I see him now hasn't the best of complexion. He said he was working 18 hours at a stretch; at times. The house was in [fol. 73] a little upset condition because from information I obtained they were in the process of moving——

The Court: We don't care about that. Just about his condition.

The Witness: This enters into it, because of the fact, as I said before, this man was in a subnormal condition.

Q. Did you examine his back?

By Mr. Richter:

A. I examined him, as far as a full examination is concerned.

Q. What did you find with his back?
A. There was tenderness and pain.
Q. In what part of his back?
A. In the lower back.
Q. Did you look at his hand?
A. I looked all over.
Q. What did you notice about his left hand?
A. Nothing particularly.
Mr. Richter: All right. Cross-examine.

Cross-examination (N. T. pp. 82, 83).

By Mr. Heebner:

Q. What did you diagnose his back complaint to be?
A. A part of his whole condition which I, in my opinion, felt that the man was suffering from neurasthenia.
Q. And what is that?
A. A complete let-down, physically, of the whole system, physically and nervously.
Q. Caused by overwork?
A. I believe the man was in a state of exhaustion.
[fol. 74] Q. He was in a condition where he needed rest, among other things, perhaps, to bring him back to normal health?
A. That is right.
Q. Were there any cuts, bruises, or marks on his body that you noticed?
A. I found none.
Q. And he made no complaint to you, as I understand, about his left hand, or either one of his hands?
A. No.
Mr. Heebner: Thank you.

Redirect examination (N. T. pp. 83, 84).

By Mr. Richter:

Q. Did you find tenderness?
A. I did find tenderness and pain in the lower back.
Q. Who had summoned you, Doctor, to his home?
A. You can guess as well as I,—I don't know. The Missus had her place of employment; she came home shortly afterward. I think she worked for the same concern. And, as I said, the two railroad men were there. They said I had attended or someone in the family

previous to this time when they lived in the neighborhood in which I practiced.

Q. But you had your recollection of that previous acquaintance?

A. No, I had not.

Q. Isn't it a fact that you were summoned by some one from the Reading yard to go to the house?

A. I don't think so, but I can understand how it would be possible.

Q. Just see if you can recall.

A. I wouldn't know——

The Court: He said he didn't know anything about who summoned him.

[fol. 75] Mr. Richter: All right.

Recross examination (N. T. p. 84).

By Mr. Heebner:

Q. Were any of the children there?

A. Yes, sir.

Q. How many?

A. I don't know,—there was a young lady there.

Q. A young girl or a lady,—about what age?

A. Well, that was in passing,—because I was really more considered about the man and his condition, and getting a history of the case.

Mr. Richter: That is all, Doctor.

Mr. Richter: Dr. Jepson, please.

Dr. Paul N. Jepson, having been duly sworn, was examined and testified as follows:

Direct examination (N. T. pp. 85-91, inc.).

By Mr. Richter:

Q. Where is your office, Doctor?

A. 255 South 17th Street.

Q. You are a graduate physician, are you not?

A. Graduate, University of Pennsylvania, 1920.

Q. Have your specialized in any particular field of medicine?

A. Orthopedic surgery.

[fol. 76] Q. And where is your office?

A. 255 South 17th Street.

Q. With what institutions are you presently associated?

A. I am Chief of the Doctors.

Mr. Heelner: I will admit the Doctor's qualifications.

Mr. Richter: I want the jury to hear it.

The Court: All right.

The Witness: Chief of the Doctors'; Chief of the Philadelphia General; Chief at St. Joseph's; and I am Chief at the Rush Hospital; and I am consultant on various hospitals outside of Philadelphia.

By Mr. Richter:

Q. Did you examine the plaintiff in this case, John Myers?

A. I did, on November 16, 1944 at your request.

Q. Will you tell us what your examination revealed?

A. The patient complained of pain in the back, which he said he had since June 11, 1944; and he said that while working on the Railroad Company he fell back from operating a kicking brake, and he felt a sharp pain in his back, and got down from the car, and became unconscious; he was brought home, and stayed in bed at home for two weeks, and then the Company doctor thought he was all right to go back. He said he was unable to return.

Another doctor sent him to St. Joseph's Hospital, where he had traction on a fracture board for two weeks, and he was released and went home. He had no flat, no fracture boards at home, and no treatment, according to his story.

He complained of numbness over the fourth and fifth fingers of the left hand. Physical examination revealed flexion deformity of 15 degrees of the left fourth finger. His feet were mildly flat. His back motion range, normal; [fol. 77] only slightly limited. His left lower extremity was one-half inch short. Straight leg raising was normal.

I advised a fracture board under the mattress, and special orthopedic shoes so as to overcome the shortness of the left side, a sacro-iliac belt, and a baking and massaging of his back twice a week.

I again saw him on 4-4-45, at which time he had not gotten the shoes or purchased the belt. His left hand was better. He still complained of pain in his back.

I saw him again on 5-17-45, at which time he had normal

grip of the left hand, and had no complaint about that hand. The belt was fitted. He had not yet gotten his shoes.

Today's examination would indicate recovery from injuries if it were not for some restriction of motion in his back.

I again saw him on 5-22-45, at which time he said at the end of the day his back pained; he was unable to lift, and he had trouble in sleeping. Yesterday's examination revealed his back motions were restricted more today than at the time, 5-17, especially his forward and left lateral back motion.

I made a diagnosis of low back strain and temporary ulnar palsy of the left hand.

Q. What is ulnar palsy?

A. That means palsy affecting the ulnar nerve and its tributaries,—these fingers (indicating).

Q. That is paralysis?

A. Paralysis. The point that was mostly affected is the flexion of the fourth and fifth fingers on the hand.

Q. Did you notice any thing particular about the finger itself,—was it normal?

A. The finger, as I said, had a 15 degree flexion abnormality.

Q. Will you demonstrate that to the jury?

A. He had a flexion deformity about like that. (Indicating.)

Q. Now, Doctor, in your examination when you noticed [fol. 78] this restriction of motion you spoke of, will you tell us what you can see yourself?

A. He had muscle spasm in the back. A muscle spasm is indicated at the time of examination by the muscle standing out like a cord.

Q. You can see that by looking at it?

A. You can see that by looking at it. His examination was so conducted he didn't know what I was trying to do, and therefore I felt I got an honest restriction of motion.

Q. Was there any way this man could possibly put anything over on you to produce this symptom in his back?

A. Yes, it is possible, but it isn't very probable.

Q. From your experience you can tell whether it is normal reaction to the bending?

A. Most always.

By the Court:

Q. Were you able to diagnose what was the cause of the muscle spasm?

A. The cause of the muscle spasm was due to a low back strain; strain of the muscles that support the low back.

By Mr. Richter:

Q. Now, Doctor, in this case the history is that John Myers had worked for the Reading Company for six or seven years, and for some months prior to the accident he had been working seven days a week, twelve hours a day continuously; he had been able to do his work faithfully and well, and made no complaint of any pain, and believed himself to be in good health. On June 11, 1944, as a result of circumstances that transpired while at work he suffered a fall of some eight feet from the brake platform of a freight car, to the ground, at which time he was semi-unconscious or dazed; he was unable to rise by himself and was unable to leave the scene by his own motion, and it [fol. 79] was necessary to carry him from that point between the cars up to the shanty or yard office, in which he was removed by automobile to his home; where on examination it was shown that he was in a state of some shock, in view of the fact his blood pressure was low; there was tenderness in his back at that time, and he was under the care of Dr. Gayl, who saw him within a day, and found marked tenderness of the back, and he came to Dr. Gayl's office and received baking, massage, and electrical treatment until sometime around the first of July when Dr. Gayl, because of the failure of his treatment to bring the necessary response, ordered him into St. Joseph's Hospital; in St. Joseph's Hospital the treatment consisted of applying traction and the usual treatment for that complaint such as you would render to him, and thereafter this man was not able to return to work until September 2, 1944, when he took a job as motorman, and then worked intermittently, complaining he wasn't able to work a full week, although during that time he did succeed in getting several full weeks in; that he went to work for the Pennsylvania Railroad sometime in February, 1945, as fireman, and during that period he apparently was unable to work full time, and finally resigned because of the reaction he felt from the work he was doing; that he returned to the

P. T. C. and there again was unable to do full time work. Taking into consideration the history and your own examination, and the diagnosis you made of low back strain, are you able to form an opinion as to the cause of the low back strain this man has?

A. It is entirely possible that the accident which you described was the causative factor, but I didn't see this man for five months after his accident, and ordinarily a low back strain will make a recovery in from three to four months, and so I can't say what transpired between the time of the accident and the time I saw him. But, such an accident as you have described could have caused low back strain such as that.

[fol. 80] Q. Assuming that everything what I have told you in my question was——

A. If nothing else transpired between those two dates I would say that the accident was the causative factor.

Mr. Richter: Cross-examine.

Cross-examination (N. T. pp. 91, 92, 93).

By Mr. Heebner:

Q. Would the fact that one leg was a half inch shorter than the other have any bearing on it?

A. Yes, sir.

Q. That is a natural condition that did not arise as a result of this accident?

A. That is right.

By the Court:

Q. What would be the cause of that, Doctor?

A. That may have been congenital,—he might have been born with that,—many people are.

By Mr. Heebner:

Q. A man whose work consists in the use of his back in climbing on freight cars, or if he is a fireman, perhaps shoveling coal, or moving various things that require the use of pressure from his arms and shoulders, would or would not the fact that one leg was a half inch shorter than the other have a tendency to increase the likelihood of such a be[illegible] condition as you have described?

A. That is right.

Q. Mr. Myers didn't tell you that he fell from a railroad car?

[fol. 81] A. He said he fell back from operating a kicking brake. I have "kicking brake" in quotations.

Q. He said he fell back?

A. Yes, sir.

Q. And he said, as I understand, in climbing down from the car he became dazed or dizzy, or something?

A. My history that I have, in getting down from car he became unconscious.

Q. In getting down from car he became unconscious, but he didn't tell you he was thrown from the brake step on a coal car, while he was handling the brake and at a time when there was an unexpected movement of the train or car?

A. I do not have that in my history which was taken November, 1944, and I don't remember that.

Q. If he had said that you would certainly have made a note of it?

A. I usually put down the details because they are important.

Mr. Heebner: That is all.

Redirect examination (N.T. p. 93).

By Mr. Richter:

Q. Would the fact that the man has one leg longer or shorter, would that be more likely to precipitate the condition such as you described?

A. That is right.

Q. In other words, he is more subject to suffer on an occasion such as occurred here because of that condition?

A. That is right, yes.

[fol. 82] Recross examination (N.T. pp. 93, 94, 95).

By Mr. Heebner:

Q. That is also true in every other field,—he is more subject if he takes an unexpected step?

A. That is right, because with the strain of the extremity the back is in a position of strain.

Q. He is in a position of strain constantly?

A. Continuously.

Q. Even with normal——
A. Even with normal position of standing.
Q. Constantly.
A. Constantly.

By the Court:

Q. Doctor, I think you said when you examined him in November he had palsy in the left hand; there were two other doctors here who examined him at the time he said this accident took place and found nothing wrong with the left hand at that time, in June; would you say that this palsy was the result of an accident or was that just a natural congenital condition?

A. I do not think that was congenital. My conception of the condition is that he might have had a slight hemorrhage, and that may have caused temporary pressure on the ulnar nerve, and as the hemorrhage dissolved or became dissimulated the pressure was relieved and his hand became back to normal.

Q. You mean that could have happened naturally between June and November?

A. Palsy like that may come on in ten days or three weeks after an accident, and not be noticed at the time of the first examination.

Q. It could come either from an accident or naturally? [fol. 83] A. I do not think it would be natural; I think there would have to be some sort of pressure that would cause it.

Mr. Richter: All right, Doctor, thank you.
Mr. Richter: Miss Shea.

Florence M. Shea, having been duly sworn, was examined and testified as follows:

Direct examination (N.T. pp. 95, 96, 97, 98).

By Mr. Richter:

Q. By whom are you employed, Miss Shea?
A. Reading Railroad.
Q. In what capacity, please?
A. Clerk.
Q. Now, did you at my request produce the earnings of John Joseph Myers, conductor No. 22930?

A. Yes, sir.

Q. Will you tell us, please, what Mr. Myers' earnings were for January?

A. January, 1944, first, $182.80.

Q. Is that January, 1944, or 1945?

A. 1944.

January, second period, $170.53.

By the Court:

Q. That is the middle and the end of the month,—you pay every two weeks?

A. Yes, sir.

[fol. 84] By Mr. Richter:

Q. And February?

A. February, first period, $144.98. February, second period, $189.71.

Q. And March, please?

A. March, first period, $202.82. March, second period, $239.93.

By the Court:

Q. Now, just a minute. We have $202.82 for the first period of March,—do you have how many hours or weeks he worked there?

A. No, I do not; I just have the amounts.

The Court: All right.

By Mr. Richter:

Q. And for April?

A. April, first period, $222.79. April, second period, $197.65.

Q. May?

A. May, first period, $189.37. May, second period, $198.08.

Mr. Heebner: In other words, Your Honor, the rate of pay was $9.14 per day for eight hours, and thereafter was overtime.

The Court: That is pretty difficult to work out,—I will have to leave that up to you.

By Mr. Richter:

Q. And for the period in June that he worked prior to the accident he earned how much?

[fol. 85] A. $89.20.

Q. And the total for 1944, from January to the time of the accident was how much?

A. $2,027.86.

Q. Now, I believe, taking away the period of June that he had worked, would leave $1,938.66 for the first five months, or 22 weeks of work, is that correct?

The Court: Just let that statement go in.

(The statement referred to, entitled "Statement of amount earned" was marked Plaintiff's Exhibit 4, and is filed with these proceedings.)

By Mr. Richter:

Q. He has not worked for the Company since that time?

A. No, he has not.

Mr. Richter: Cross-examine.

Mr. Heebner: No questions.

Mr. Richter: Will the young lady from St. Joseph's Hospital come up, please.

[fol. 86] Elizabeth Carty, having been duly sworn, was examined and testified as follows:

Direct examination (N.T. pp. 98, 99).

By Mr. Richter:

Q. By whom are you employed, Miss Carty?

A. St. Joseph's Hospital.

Q. In what capacity?

A. I am custodian of records, and record librarian.

Q. Does your record indicate the date when Mr. Joseph J. Myers was admitted to the hospital?

A. He first came to the out-patient department on June 29, 1944, and then he was admitted to the hospital on July 1, 1944.

Q. And when was he discharged?

A. On July 10, 1944.

Q. Your out-patient department, does that show further visits?

A. That is the only time he came, on June 29.

Q. That one visit?

A. Yes, sir.

Q. Do you have the bill of the hospital for that period?
A. Yes.
Q. And what is that bill?
A. $58.00. That was paid.
Mr. Richter: I offer that receipt in evidence, Your Honor.
Mr. Heebner: I have no objection.
The Court: All right.

[fol. 87] (The receipt of St. Joseph's Hospital referred to, was marked Plaintiff's Exhibit 5, and is filed with these proceedings.)

Mr. Richter: That is all, thank you.

Mr. Richter: Your Honor, we are waiting now for Dr. Lefkoe. He has been operating all morning. I would like to recall Mr. Myers for just one question at this time. I expect the doctor at any time.
The Court: All right.
Mr. Richter: Mr. Myers, will you come up.

JOHN MYERS (recalled).

Direct examination (continued) (N.T. pp. 99, 100, 101).

By Mr. Richter:

Q. Mr. Myers, had you or any member of your family ever used Dr. Tomlinson before the time that he came to your home that night?
A. No.
Q. Have you known him before that date?
A. I have not.
Q. Do you know who sent for him?
A. One of the men who brought me home.
[fol. 88] Mr. Heebner: That is objected to. I do not think that is material at all.
Mr. Richter: I think it is. We want to show whose doctor he is.
The Court: I do not think that is material. You called him as your witness, and said he was the physician who was called, although he said he didn't know by whom.

I will allow the record to show that Mr. Myers didn't call him.

Mr. Richter: That is as far as I wish to go.

The Court: But I don't see what else he would know about it.

Can I see counsel?

(Conference at side bar.)

The Court: Now, members of the jury, the plaintiff wishes to call another physician at this time, and he will be the last witness for the plaintiff; he has been operating all this morning and is on his way to the court room, and so we will take a short recess at this time. We will call you in just as soon as he comes. You need not come back to the jury box until we call you.

(The jury retires.)

The Court: We will take a short recess at this time.

Mr. Richter: The information is that he has left the hospital, and his office says that he knows he is due down here as soon as he finishes.

The Court: All right, as soon as he comes, we will resume.

[fol. 89] Mr. Heebner: May Mr. Richter and I see Your Honor at side bar a moment?

The Court: Yes, sure.

(Conference at side bar.)

(Informal recess.)

The Court: All right, you may call in the jury.

(The jury returns to open court.)

The Court: Now, members of the jury, the plaintiff has one more witness to call, a physician, as I suggested before we took the recess. We have just been informed by telephone that he was called for an emergency operation and will not be here for about an hour. So counsel on both sides have agreed that the defendant shall open its case, and we will hear some witnesses for the defense, and as soon as the physician arrives we will allow him to take the stand for the plaintiff, so that this witness will be called somewhat out of order, but we will do that to save time.

[fol. 90] DEFENDANT'S EVIDENCE

Mr. Heebner: Is Mr. Weisel here?

MILTON D. WEISEL, having been duly sworn, was examined and testified as follows:

Direct examination (N.T. pp. 102-111 inc.).

By Mr. Heebner:

Q. Mr. Weisel, on June 11, 1944, you were employed by the Reading Company, were you not?

A. Yes.

Q. In what capacity?

A. As engineman.

Q. In what kind of engine were you operating?

A. O. E. 51, that is an oil-electric.

Q. And you were on duty from 6:30 P. M. to 6:30 A. M. the following morning?

A. I was.

Q. That is, on June 11?

A. Yes, sir.

Q. Who else was with you in the crew that night?

A. Edward B. Kiernan, the flagman, William Kelleher, John Myers was conductor, and there was an extra man I don't know his name.

Q. Is that Daniel C. Hinkle?

A. I heard the name in court.

Q. And the four of you were under whose charge that night, as far as operating?

A. Under whose charge?

Q. Who had charge of the crew?

A. Conductor John Myers.

[fol. 91] Q. The conductor is in charge?

A. As to the operating of the train, the moving of the train and the operation of the train.

Q. Did you all meet that night somewhere before you started out together?

A. We did.

Q. Where did you meet?

A. At the brakemen's locker room.

Q. And where is that?

A. At Thompson Street, known as the level.

Q. Is that in the Port Richmond yard?

A. It is.

Q. Is that where you intended to work that night?

A. In that district there.

Q. That is your classification yard and storage yard?

A. It is.

Q. What time did you first see Mr. Myers that night?

A. Well, about 6:30 P. M.—that is the starting time.

Q. Was he perfectly normal and healthy as far as you observed?

A. He complained to me he was feeling ill.

Q. Did he say what was the matter with him?

A. He complained he was sick on his stomach.

Q. What did he decide to do with regard to going to work?

A. Well, we were short of two men; I didn't have no helper, and he was short of a brakeman. We laid around there quite some time before we got a full crew, and he was thinking about reporting off, that is, he was talking about it.

By the Court:

Q. You say he was thinking,—did he tell you?

A. Yes, sir, that is what he told me.

By Mr. Heebner:

Q. But, ultimately he did go to work with the rest of the crew?

[fol. 92] A. Yes.

Q. Where did you go first?

A. We went down toward Pier 11; on just what track I can't recall.

Q. Did you eventually reach that part of the yard which appears in the photograph marked Plaintiff's Exhibit 1,—do you recognize that? (Producing same.)

A. I do.

Q. What does that show, Mr. Weisel?

A. It shows No. 1, No. 2, and No. 3, over to about five or six tracks on Pier 11.

Q. On Pier 11,—that is a view looking east toward the river?

A. Yes, sir.

Q. The Shore Road which you heard discussed here is between the river and the end of the tracks that you see in that photograph?

A. It is.

Q. You heard the plaintiff, Mr. Myers, testify as to the movements that were made that night at around 9:30 o'clock?

A. I did.

Q. You were in charge of this Diesel locomotive which was headed in which direction on No. 2 track?

A. It was headed east.

Q. That is toward the river?

A. Toward the river.

Q. How many cars did you have hold of?

A. About six or seven.

Q. And where were you going to place them?

A. We were going to place them on track No. 2, Pier 11.

Q. Where had these cars been before your locomotive pulled them?

A. I can't recall exactly.

Q. In other words, had you moved them far before you got to the place shown in photograph P-1?

A. No, it was right on the Pier 11 district there.

[fol. 93] Q. Were there any other cars on track 2, east of the draft you had hold of?

A. There were several cars down toward the bumper, or at the bumper, I should say.

Q. I understand that the plan was to push these six or seven cars you had against these three, and couple them all up, is that right?

A. That is it.

Q. Now, as you moved south and then east, the track curves toward the river, or east?

A. That is right.

Q. And you were on the west or the south side of your locomotive?

A. On the south side.

Q. That is on the outside of the curve?

A. It would be.

Q. From whom did you get the signals with regard to when to move and how far to go?

A. From the helper, Kiernan.

Q. He was on the other side of your Diesel engine?

A. He was.

Q. Is that a cab that runs all the way across?

A. All the way across.

Q. And you can see him all the time?
A. I can.
Q. And you are looking at him all the time?
A. I can.
Q. You couldn't see any other members of the crew?
A. I couldn't.
Q. Was it daylight or dark as you pushed these seven cars in?
A. Daylight.
Q. The men had not yet started to use lanterns to make signals with?
A. No.
Q. As I understand, the seven cars were moved in and [fol. 94] coupled to the three that were standing there, and then what was the next move you made, if any?
A. That was the last move I made.
Q. What happened after that?
A. The flagman, Kelleher, told me to come up, there was something wrong with Myers.
Q. What did you do as a result of what he told you?
A. I walked back toward the bumper.
Q. With Kelleher?
A. Yes, with Kelleher.
Q. And did you find Mr. Myers?
A. Yes.
Q. And where was Myers?
A. Myers was laying on the ground when I got back there.
Q. Opposite about what car in the draft?
A. Oh, I would say about the third car on the track from the bumper.
Q. The third car from the bumper?
A. Or the fourth,—the third or the fourth car,—I am not positive.
Q. There were, then, about ten cars between the engine and the bumper?
A. Between the engine and the bumper.
Q. Then what did you do?
A. Well, I looked the situation over, and we decided to cut the engine off and run the engine up to the yardmaster's for to get a stretcher to get him out of there.
Q. Did Myers say anything to you when you reached him?

A. No, not when I came down the first time.

Q. Was he conscious or unconscious?

A. Well, he seemed to be dazed.

Q. Did you notice whether he had a lantern with him or not?

A. I can't recall.

Q. And where were the other members of the crew at this time, do you remember that?

[fol. 95] A. If I am not mistaken the fireman followed me down,—I am not sure.

Q. And how about Hinkle, the other man?

A. I don't remember that.

Q. You don't remember where he was. Then, what happened after you left the first time?

A. Well, we went up to the yardmaster's office, and they didn't have no stretcher. So I ran the engine back down on Pier 11, on the same track, and Kelleher and I decided to carry him to the engine. We placed him on the engine and took him to Thompson Street, and there he was taken off the engine by someone else,—I don't recall who it was, and he was taken home in an automobile.

Q. You didn't go home with him?

A. No, I stayed with the locomotive.

By the Court:

Q. You said the first time he didn't say anything; when you got back the second time, did he say anything?

A. Yes, sir.

By Mr. Heebner:

Q. What did he say?

A. He asked to be taken to the hospital, that he was ill.

Q. As far as you could see he wasn't able to walk?

A. That is right.

Q. Was he between the second and the third tracks when you first found him?

A. Between the tracks,—between two and three.

By the Court:

Q. He wasn't laying between the rails of one track,—he was laying between two different tracks?

A. He was laying between the two tracks.

[fol. 96] By Mr. Heebner:

Q. When I speak of the track, Mr. Wiesel, I am speaking of a track consisting of the two rails?

A. That is right.

Q. And track No. 2 is the track that has two rails which was holding your train?

A. Yes, sir.

Q. And he was in the dummy between tracks 2 and 3, is that right?

A. That is it.

Q. At the time you were making the coupling with the three standing cars there, or with the several cars that were standing, did your locomotive on the draft of cars move at all until after you had picked up Mr. Myers?

A. I don't understand that question.

Q. When you pushed the seven cars——

The Court: He already answered that. He said the last move he made was when the cars were coupled. Counsel wanted to know if you made any other move. I understood you to say that when the seven cars were coupled to the three cars that that is the last move your train made before you found Mr. Myers?

The Witness: That is right.

Mr. Heebner: All right, strike the question out. Cross-examine.

Cross-examination (N. T. pp. 111-117 inc.).

By Mr. Richter:

Q. Now, Mr. Weisel, Mr. Myers was the man in full charge of the train crew?

A. He was the conductor.

[fol. 97] Q. And he is in full charge as conductor?

A. The conductor and the engineman are both responsible.

Q. Who is the man of superior authority, the engineman or the conductor?

A. The book of rules does not——

Q. Don't you know, Mr. Weisel, that the conductor is always in charge of the train and give orders to anybody?

A. He gives orders according, to move, start, and stop.

Q. All orders must come from the conductor?

The Court: I think he said that he is in charge of the train movements, but I do not think Mr. Myers had any control over the operation of the engine.

By Mr. Richter:

Q. You wouldn't move the engine unless you received some signal from the train crew?

A. No.

Q. In this case you were watching for the passing of the signal to you by your fireman, because you were on the other side?

A. That is right.

Q. It was actually getting dark when this accident occurred,—it wasn't daylight?

A. It was around 8:30.

Q. Was it getting dark?

A. No, it wasn't dark.

Q. Was it just getting to get dark?

A. I could still see across the river.

Q. I know, but wasn't it more or less twilight?

The Court: He said he could see across the river.

[fol. 98] By Mr. Richter:

Q. It wasn't like it is at 6:00 or 7:00 o'clock—this happened at about 9:00 o'clock?

A. No, it happened around 8:30. At 9:00 o'clock he was put in the car.

Q. I had asked you questions in my office about this, and you were asked, "Was it light or dark when this happened?" And your answer was, "It was just starting to get dark." Didn't you so testify?

A. I don't recall.

Q. If you testified that way before, that was the truth then?

A. Yes.

Q. It was Mr. Heebner who asked you the question, "Was it light or dark when this happened?" Your answer was, "It was just starting to get dark." Didn't you testify that way?

A. I don't recall.

Q. Suppose you read the question and the answer——

The Court: He says that he can't recall.

By Mr. Richter:

Q. That is the truth, isn't it?

A. Yes, sir.

Mr. Heebner: You are referring to page 12?

Mr. Richter: Yes.

By Mr. Richter:

Q. Now, you say Mr. Myers made some complaint to you earlier in the evening, is that correct?

A. Yes.

[fol. 99] Q. When you got your engine, did you have your fireman with you?

A. No.

Q. You mean you got on the engine alone?

A. We were delayed, at least, one hour for a fireman and a brakeman.

Q. And then you got a fireman?

A. I did.

Q. Did you get on the engine before the fireman got there?

A. I got on the engine, but I didn't move.

Q. Did you talk to Myers before this accident occurred?

A. I spoke to him when I came to work.

Q. Did you even see Mr. Myers before the accident occurred?

A. Yes.

Q. You were asked this question, were you not, Mr. Weisel, under oath in my office, by Mr. Heebner, counsel for the railroad: "When you took ahold of these cars were they on track 3, when you first took hold of them?" Your answer was, "I don't recall."

And then on page 19: "Did you see Myers at any time prior to the time you came to a stop on track 2?". Your answer was "No." And the next question, "You didn't see him at all?" Your answer was, "No." Did you testify that way?

A. I seen Mr. Myers before we started to work.

Q. Perhaps you can explain what you meant when you testified the way you did on page 19 of this deposition, taken in my office before trial——

A. I didn't see him when we were on track 2, because he was out of my sight. That is what I meant by that.

Q. But Mr. Heebner's question was "Did you see him at any time?"

The Court: He said he saw him before they started working, but that he couldn't see him on track 2, because [fol. 100] he was on the other side. I don't think that is contrary to what he has said here. We just want this witness to say what is what, that is all.

Mr. Richter: That is all.

The Court: He says he talked with him before they got on the engine, and then when he was on the engine he was down on the track, and he didn't see him at that time.

Mr. Richter: I know, Your Honor, but the question reads as follows: "Did you see Myers at any time prior to the time you came to a stop on track 2" The answer is "No". "You didn't see him at all?" The answer was, "No".

The Witness: I didn't see him at any time on track 2 before the accident.

By Mr. Richter:

Q. After Kelleher had spoken to you, when you came to where Myers was, where did you find him?

A. Laying between No. 2 and No. 3 tracks.

Q. He was lying on the ground?

A. He was.

Q. Now, it i a fact or isn't it a fact that within a very few moments before you learned from Kelleher that there was something wrong with Myers you had received a stop signal from your fireman?

A. I received a stop signal from the fireman.

Q. When was the stop signal given, when the train was moving or when it was standing still?

A. When the train is in motion.

Q. The purpose of a stop signal is to tell you to stop, isn't it?

A. Yes, sir.

[fol. 101] Mr. Richter: That is all.

Redirect examination (N.T. p. 117).

By Mr. Heebner:

Q. When you refer, Mr. Weisel, to this occurrence as having taken place at approximately 8:30, you are referring to standard or daylight saving time?

A. I guess it was Eastern War Time.

The Court: That is the answer, Eastern War Time, which is an hour earlier than standard time.

Mr. Heebner: All right, thank you very much.

Mr. Heebner: Mr. Kiernan.

EDWARD B. KIERNAN, having been duly sworn, was examined and testified as follows:

Direct examination (N.T. pp. 117-123 inc.).

By Mr. Heebner:

Q. Mr. Kiernan, on July 11, 1944, you were employed by the Reading Company?

A. I was.

Q. And what was your position?

A. I was helper on the Diesel engine.

Q. On that night, at 6:30, were you on the Diesel engine with Mr. Weisel, who just left the stand?

A. I was.

[fol. 102] Q. What locomotive was that?

A. I was on OE 51, but I wasn't on it until approximately twenty minutes to eight.

Q. You participated in this movement that has been described, as helper on the Diesel?

The Court: Mr. Weisel said they had to wait for this man and another man for about an hour, and twenty minutes to eight, he came up.

The Witness: That wasn't my fault.

The Court: No, we are not criticising you; you were probably working somewhere else,—I don't know, but we are not interested in that.

By Mr. Heebner:

Q. Anyway, you were a member of the crew which Mr. Myers was in charge of in connection with the classification of cars that night?

A. Yes, sir.

Q. Will you look at the photograph, Plaintiff's Exhibit 1, Mr. Kiernan, and tell us what that shows?

A. That shows Pier 11, North, and tracks 1, 2, 3, 4, 5, 6, and the bumper, I guess, on 7.

Q. You heard the description given of the movement on track No. 2 toward the river there on this night?

A. I did.

Q. And where were you when the locomotive was pushing these six or seven cars?

A. I was on the left side of the cab.

Q. And what were you doing?

A. I was relaying signals to the engineer.

Q. From whom did you get the signals?

A. I was getting them from the engine crew.

Q. From what?

[fol. 103] A. From the train crew, rather, I beg your pardon.

Q. And who were they?

A. A new man by the name of Hinkle, the front man; and Bill Kelleher, the hind man, and John Myers, the conductor.

Q. Did you see them, or any of them, as you moved the draft in?

A. Oh, yes, I had to see at least one of them.

Q. Was it still light or was it dark?

A. I would say it was dusk.

Q. But you could still see the river from where you were?

A. Yes, sir.

Q. Had you started to use lamp signals yet?

A. Only one, that is the conductor.

Q. While you were pushing the seven cars in there there were some cars standing next to the bumper on No. 2 track?

A. Yes, sir.

Q. Remember how many?

A. At least two or three.

Q. The idea was to couple this draft to those cars?

A. The way I understood it to be, yes, sir.

Q. Where was Mr. Myers as the draft of seven cars was being pushed on the siding, south, to meet the other two or three cars?

A. He was standing where the coupling was to be made.

Q. On the ground?

A. Yes, sir.

Q. On which side, or where was he standing?

A. Well, he was on the left side of the train as it was going in.

Q. That is on the north side?

A. Between tracks 2 and 3.

Q. Between tracks 2 and 3. Were there any cars on track 3 at that time?

A. Yes, there were.

Q. Could you see Hinkle at all?

[fol. 104] A. I could see him on the front of the engine,—he was riding, mostly, on the engine step.

Q. Where was Kelleher as you moved in toward the three cars?

A. He was in the middle of the seven cars.

Q. He was on the ground, too?

A. Yes, sir.

Q. Both Mr. Myers and Mr. Kelleher were on the ground as the draft of seven cars were being pushed in?

A. Yes, sir.

Q. Suppose you go on and tell His Honor and the members of the jury what you observed from the time you started in to make the coupling?

A. When I saw the coupling was made I got the stop signal with the lamp, and also by Bill Kelleher, and I told the engineer and he stopped. We laid there, and I didn't see anybody for a while,—we were waiting for another signal,—and this man, Hinkle, called to me in the cab window, he says, "John Myers wants to see you." I said, "What does he want?"——

Mr. Richter: I object to this conversation.

The Court: Just tell us what you did; don't tell us what was said.

The Witness: Bill Kelleher came up and said the same thing——

Mr. Heebner: Don't tell us what he said,—just tell us what you did.

The Witness: I got off the engine with Weisel, and we walked back to John Myers, where he was; he was lying on the ground. We saw he wasn't in position to walk,—he was sort of groaning, and he was in a semi-conscious state; [fol. 105] we went back to the engine, uncoupled the engine, and went back to look for a stretcher at the yardmaster's office; there wasn't any there, and we informed him that John was sick or something, and we went back on the same track, and walked back to John, and Weisel and Kelleher picked him up and carried him to the engine and put him on the step. Then we run to Thompson Street, and I got off the engine and helped Bill Kelleher carry him down the step and put him into the car.

By Mr. Heebner:

Q. Mr. Kiernan, prior to the time the seven cars were coupled to the three standing on track 2, had you seen Mr. Myers on any of the cars?

A. Yes, I did.

Q. Where was he?

A. Prior to that time, you mean?

Q. Prior to that time, yes.

A. I can't recall whether I saw him on top of any cars.

Q. What kind of cars?

A. Hopper cars.

Q. Hopper bottom coal cars?

A. That is right.

By the Court:

Q. I think I heard you say that Myers and Kelleher were standing on the ground as these seven cars were being pushed forward?

A. That is right.

Q. Before these cars came to a stop, did you see him at any other place except on the ground?

A. Not that I recall, Your Honor, no.

[fol. 106] By Mr. Heebner:

Q. Did you go with him to his home that night?

A. No, sir.

Q. Did Mr. Myers say anything to you or in your presence while he was being moved from where you found him?

A. No, he didn't say anything.

Mr. Heebner: Cross-examine.

Cross-examination. (N. T. pp. 124-131 inc.).

By Mr. Richter:

Q. I think you said you first saw him while the cars were coming back, on the ground?

A. Yes, sir.

Q. After the cars stopped you saw him on one of the coal hopper cars?

A. I saw the light.

Q. That is where the brake was on the coal hopper, is that correct?

A. Yes, sir.

Q. It was about 9:00 o'clock when this accident happened?

A. I believe so.

Q. It wasn't earlier?

A. Well, judging time like that, it is pretty hard.

Q. But your opinion is that it was 9:00 o'clock?

A. In my opinion.

Q. It was after the cars had stopped and you then saw Mr. Myers upon the coal cars when you saw him waving a stop signal?

A. No, I got a stop signal previous to that, I believe. [fol. 107] Q. You couldn't see between the cars, could you, any signals, when there is a train on the track?

A. Yes, that is why we signal.

Q. You couldn't see from the position you were in unless he was on top of the cars?

A. That is true.

Q. You said you didn't see him on top of the cars until after the train came to a stop?

A. That is what I said, yes.

Q. So that any signal you received from Mr. Myers came after the train came to a stop, and you saw him on top giving the stop signal, is that correct?

A. This was so long ago that is pretty hard to remember.

By the Court:

Q. I can't understand that. I thought you said they were on the north side of the train, Myers and Kelleher, standing on the ground?

A. That is right.

Q. Who gave you the stop signal to stop when the train was coming?

A. I got it from both of them.

Q. You mean Myers and Kelleher?

A. Yes, sir.

Q. They were on the north side of the bend, and you could see all the way front?

A. That is what I am a little bit hazy about.

Q. I am trying to get the facts from what you are saying there,—I don't know; then, I understand you to say after Mr. Hinkle signalled to you——

A. No, I got my signal off Bill Kelleher; he was relaying them back to Hinkle. I got the stop signal from him.

Q. That is the stop signal?
A. Yes.
[fol. 108] Q. Then I understood you a few minutes ago, when Mr. Richter asked you if you didn't get the stop signal from Mr. Myer when he was on the car and you said "no." He repeated that question and you said you were a bit hazy about that; now, which is it?
A. No, the train was stopped then.

By Mr. Richter:

Q. As a matter of fact, your first signal you received as the coupling was made was received from Mr. Hinkle?
A. Yes, sir.
Q. He was the man near the engine?
A. Yes, sir.
Q. It wasn't Kelleher?
The Court: He said Kelleher relayed the signals to Hinkle. I don't like you to argue with the witness.

By Mr. Richter:

Q. Yes, but you say Hinkle gave that signal?
A. Yes, sir.
Q. The train was stopped and coupled?
A. Yes, sir.
Q. At that time there was nobody on top of the car?
A. No.
Q. And thereafter you saw Mr. Myers up on top of one of the coal cars?
A. Yes, sir.
Q. You saw him at a brake?
A. I imagine it was a brake,—he was on top of the car.
Q. And you saw him give the stop signal?
A. No, sir.
Q. You couldn't see Myers give you the stop signal?
A. No——
[fol. 109] Mr. Heebner: He didn't say that he couldn't see.
Mr. Richter: That is what I understood him to say——
The Witness: I said he was on top of the car and——
The Court: I know, Mr. Richter,—I am very careful,—I don't like anybody to say that a witness said something different from what he said.
Mr. Richter: I am coming to that point in a moment, if you will bear with me, Your Honor.

Mr. Heebner: You passed that point.

Mr. Richter: I haven't passed that, Mr. Heebner.

The Court: I don't want any side remarks. If either of you have anything to address the Court we will rule on it.

By Mr. Richter:

Q. Now, did you or did you not see Mr. Myers climb up on top of one of the rear cars, that is, a loaded car, after the train had come to a stop, with the lantern in his hand?

A. Yes, sir.

Q. You did see that?

A. Yes, sir.

Q. That is the first time anybody was using a lantern?

A. Yes, sir.

Q. Did you see Mr. Myers thereafter swing the stop sign with his lantern?

A. No, sir.

[fol. 110] Q. Now, you saw Mr. Myers on top of the car with this lantern—I asked you this question, on page 25, of your affidavit: "Where was Myers, all the way down at the back end?" And your answer was "Yes." "Down near the sixth or seventh car?" And your answer was, "I believe he was either on the hind end of the last car or in between the two last cars."

And the next question: "For how long a period had you seen his light moving around at the rear of the train before you did not see it any more?" And your answer was, "I judge about four minutes." "Could you see him—his body, or just the lantern?" And the answer, "Just a sort of a dark—" "Shadow?" And your answer, "That's all." "What was the last signal you received from him?" And your answer, "A stop signal."

Did you testify that way?

A. If it is written out that way, I must have.

Q. Perhaps you might like to look at it. You said that, didn't you? You were under oath, then? You were telling the truth then?

The Court: Yes, he was under oath.

The Witness: Yes, sir.

By Mr. Richter:

Q. Isn't that the truth what you said then?

A. Yes, sure.

Q. As soon as you received the stop signal from Myers what did you say to your engineer,—did you pass the signal to him?

A. Yes, sir.

Q. And did the engine come to a stop quickly?

A. Could I explain myself, how I came to answer that question?

[fol. 111] The Court: Go ahead.

The Witness: It was about in the same way as it was here now. I said there he was on the hind car or was on top of the car; he made the coupling and I could see his lantern and could see one man on the ground, because I was in position to see John if he climbed the top of the car with his lantern, and I did take a stop signal from him, and I also saw the man on the ground give it. In fact, I saw the whole three give "stop." I saw John first, and it was relayed back to me. That is how I came to say I saw him give the stop signal.

By Mr. Richter:

Q. Well then, as your engine was pushing these six or seven cars to couple with the first three did you move steadily backward?

A. Yes, sir.

Q. Did you stop at any time as you were moving back?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Directing your attention to page 27:

"Q. What was that signal?

A. A stop signal.

Q. Was your train in motion at that time?

A. If we get a stop signal, we have to be in motion.

Q. At that time could you also see Myers on top of the cars?

A. That is a recollection I am not quite sure of.

Q. Well, was it after that you saw Myers on top of the cars?

A. Oh, yes, it was after we were standing still."

[fol. 112] Now, by the time you stopped and was standing still, you had already made your coupling?

A. Yes, sir.

Q. And it was after that you received the signal from Mr. Myers?

A. No, not to make the stop.

Mr. Richter: That is all.

Redirect examination. (N. T. p. 132).

By Mr. Heebner:

Q. Just one question. Did or did not the draft of cars move from the time you got the stop signal, that is, between that time and the time that you found Mr. Myers beween track 2 and track 3?

A. No, sir—did I understand you to say if it moved at all forward?

Q. Between those two times, after the coupling was made?

A. No, sir.

Mr. Heebner: That is all.

Recross examination. (N. T. pp. 132, 133).

By Mr. Richter:

Q. By the way, did I understand on your original direct examination that after Mr. Myers was found on the ground you went back and uncoupled the engine at that time?

A. Yes, sir.

Q. Are you positive of that?

[fol. 113] A. The engineer and I went back and uncoupled the engine after we found him on the ground, to go back to look for a stretcher.

The Court: And he couldn't find a stretcher, and you came back and loaded him on the engine?

The Witness: That is right, sir.

By Mr. Richter:

Q. Your normal move, after you had coupled these cars and uncoupled the engine, was to move up to the next job?

A. Yes, sir.

Q. How did you uncouple the engine?

A. You lift the pin.

Q. Before you can lift the pin you have to have the slack run in?

A. It has to be in to lift the pin.
Q. Otherwise you couldn't do it?
A. That is right.
Mr. Richter: That is all.
The Court: All right, members of the jury, we will excuse you now until 2:00 o'clock. As I said yesterday, don't discuss this case among yourselves and don't allow anyone to discuss it with you.
You may be excused now until 2:00 o'clock.
(Whereupon, at 12:28 P. M., a recess was taken until 2:00 o'clock P. M.)

[fol. 114] After Recess

(Present: Counsel as heretofore noted.)

Plaintiff's Evidence
(Continued)

Mr. Richter: Dr. Lefkoe, please.
The Court: Members of the jury, as we said before when Dr. Lefkoe was detained and could not be here, he is now being called out of turn after we have heard several of the defense witnesses, and he is now being called by the plaintiff.

Dr. Harold Lefkoe, having been duly sworn, was examined and testified as follows:

Direct examination. (N.T. pp. 134-138 inc.).

By Mr. Richter:

Q. You are a graduate physician?
A. Of the University of Pennsylvania, 1935.
Q. You specialize in any particular branch of medicine?
A. Orthopedic surgery.
Q. Are you connected with St. Joseph's Hospital?
[fol. 115] A. Yes, sir, as orthopedic surgeon.
Q. In the course of your duties at St. Joseph's Hospital, did you have occasion to have under your care and treatment John Myers, the plaintiff in this case?
A. I did.

Q. Can you tell us what date it was you first saw Mr. Myers? You may have the hospital records if they will assist you.

A. I first saw Mr. Myers on the 29th of June, 1944, at St. Joseph's Hospital.

Q. Will you tell us what you noted about his condition?

A. At that time Mr. Myers complained of severe incapacitating back pain.

Q. Did you examine him then?

A. I did.

Q. What did you find?

A. He had evidence of marked muscle spasm in his lower back, he walked with a very careful gait. Examination of the low back showed that he was tilted markedly to the left.

Q. What are these muscle spasms?

A. This muscle spasm indicates irritation or damage to the structures underneath either bones or ligaments.

Q. As a result of the condition you found at that time did you hospitalize Mr. Myers?

A. He was hospitalized, and entered the hospital on July 1, 1944.

Q. And he remained in the hospital until the 11th?

A. Until the 10th of July.

Q. What did you do for treatment?

A. He was put in bed and kept completely flat,—he was allowed a pillow under his head, not under the shoulders at all,—he was on a hard mattress with boards between the spring and mattress so that it had absolutely no "give" under his back. He had a 10-pound weight [fol. 116] attached to each leg in order to overcome the muscle spasm; he was given physio-therapy to aid with that.

Q. After the 10th of July, did you see him again?

A. I saw him after that on the 18th of July.

Q. Did he give you a history originally?

A. The history as taken from him originally on June 29, he said that approximately three weeks before that he was putting the brake on the car and as he twisted, I believe he called it,—I don't recall the name,—but I do recall his describing it to me,—as he twisted the brake he suddenly had a snap in his low back with sharp pain. He was unconscious, and the next thing he knows he was told he was picked up by the train crew off the tracks;

he was unconscious until after he arrived home and had been there a half hour. He returned to consciousness on a couch in his home, with severe back pain, and with his head throbbing. He had not been to work between the time of the accident and June 29, 1944, as he described it.

Q. Doctor, where the plaintiff in this case testified he was standing on the brake step operating the brake on a freight car, that it had considerable spring and snap to it, that the car was suddenly jarred and the brake wheel sort of flew out of his hand and he fell to the ground eight feet, would the description of that accident be inconsistent with the type of injury you found he was suffering from?

A. It would not.

Q. What would be the cause of the condition that you found when you examined him?

A. The sudden pull, with more or less twisting motion is characteristically the cause of a condition like this.

Q. Now, Doctor, the plaintiff is, and as you probably know, he was bent more to the left than to the right,—a slight variation of the length of the legs, congenital, about a half inch difference,—what effect did that have on the injury?

[fol. 117] A. It would have no effect at all on the injury,—the cause of the injury or the result of the injury. What it would do, it would militate against his rapid recovery as an individual might if he had equal leg length.

Q. Is the condition such as the plaintiff had one that is generally accompanied by pain?

A. Always.

Q. Is it disabling?

A. Yes, sir.

Q. What was your bill for your services?

A. There was no bill in the ward rendered,—he came in the ward.

Mr. Richter: Cross-examine.

Cross-examination (N. T. pp. 138, 139).

By Mr. Heebner:

Q. Did you measure the two legs?

A. No, sir.

Q. Did you observe that one was shorter than the other?

A. When one comes in with acute pain with a condition of this sort, on physical examination it is not customary to measure the leg length during the acute stage. The reason for that being that the acute muscle spasm twists the pelvis and causes the patient to lean to one side or the other, and the leg length is determined only after the muscle spasm has disappeared.

Q. If one leg were a half inch shorter than the other, as has been testified, would that account for some tilt of his body?

A. Many people walk around without difficulty; many that we examine at the Induction Board have a short leg. When an individual has a short leg it may give him a [fol. 118] tilt but wouldn't give him the terrific muscle spasm that this man had.

Q. But it would account for some tilt of the pelvis?

A. Ordinarily that is not noticed unless you strip the man and examine him carefully. Naturally, there would have to be some tilt. It is a rather well recognized test in orthopedics.

Q. You didn't examine him for that?

A. No, sir.

Mr. Richter: That is all, Doctor.

Defendant's Evidence (continued).

Mr. Heebner: Mr. Kelleher, will you take the stand?

William H. Kelleher, having been duly sworn, was examined and testified as follows:

Direct examination. (N. T. pp. 140-148, inc.).

By Mr. Heebner:

Q. On July 11, 1944, you were employed by the Reading Company, were you not?

A. Yes, sir.

Q. In what capacity?

A. Brakeman.

Q. Where were you working that evening?

A. In the district called the "level."

[fol. 119] Q. Port Richmond?

A. That is right.

Q. What time did you go to work that night?
A. Well, approximately, around 8:00 o'clock.
Q. You have been in court all morning, have you not?
A. Yes, sir.
Q. Will you take a look at the photograph, plaintiff's Exhibit 1, and tell us what that shows, the location,—is that where you were at any time that evening?
A. Yes, sir.
Q. And what is that?
A. The coal district, where they store coal.
Q. Is that Pier 11?
A. Yes, sir.
Q. Showing tracks 1, 2, and 3, and perhaps a few more?
A. That is right.
Q. Who else was in your crew that night?
A. Mr. Myers, the conductor; myself; Mr. Kiernan, Mr. Weisel, and another brakeman, an extra brakeman.
Q. Now, getting down to the time when the coupling was made between the standing cars on No. 2 track, as I understand, six or seven cars were being pushed in?
A. That is right.
Q. By this engine on No. 2 track, and as they were being pushed eastward on No. 2 track where were you?
A. Well, when we started to shove in I was at the end of the seventh car. Myers got up on top.
Q. That is the far end from the locomotive?
A. That is right. And I dropped back in order to——
Q. You dropped back which way?
A. Toward the engine.
In order to see Myers at all times.
Q. Where was Myers at this time?
A. On top.
Q. On top of what?
A. On the coal, standing in on top of the coal.
[fol. 120] Q. Of which car?
A. The end car, toward the river.
Q. That is the lead car of the draft as it was being pushed toward the river?
A. Yes, sir.
Q. Go on and describe in your own way what you saw?
A. Well, the engine shoved the cars in, and I dropped back in order to have Myers in my vision at all times,

so I could pass the signals to the fireman,—we were working on the left hand side. The cars came together, that is, against the three that were on there already——

Q. These three cars were next to the bumper?

A. That is right.

Myers got down——

Q. How did he get down?

A. I could still see him, as I said, he put the brake on, and he climbs down off the car onto the ground.

By the Court:

Q. Was this before the cars were coupled or afterward?

A. Afterward.

Q. Had the train come to a stop?

A. Yes.

Q. The train had come to a stop and had been coupled, and then he came down on the ground?

A. That is right. He gets down on the ground and takes a few steps alongside the coal car——

By Mr. Heebner:

Q. In which direction?

A. Coming toward me, on the seventh car. I seen him lean against the car, and then he slumped to the ground.

Q. At this point where were the other two members of the crew?

[fol. 121] A. The other member,—he was alongside the engine.

Q. And what was his name?

A. Hinkle.

Q. The fireman was on the engine?

A. That is right.

Q. What did you do then?

A. I immediately rushed down to Mr. Myers; he was like sitting on his haunches,—I said, "What's the matter, John?" He said he had a terrific pain in his stomach. I said, "We got to get you out of here." I ran up to the head of the cars, part way up, and hollered to the extra man we had, Mr. Hinkle, I said, "Get the engineer down here quick, something happened to John." So Mr. Weisel came down, and we carried him up to the engine.

Q. And thereafter took——

A. Took him home.

Q. In an automobile?

A. That is right.

Q. When you got him home what was done?

A. Well, their oldest daughter,—we didn't know just what to do,—whether to take him to the hospital or home, —John apparently came to, that is, from the daze, and he directed us to his home. I never was there before, and neither was the other. The daughter said there was a doctor near there, and they called this doctor who was on the stand.

Q. That is Dr. Tomlinson?

A. The oldest man——

Q. The last one—you mean the first doctor who was called?

A. That is right.

Q. Who did the telephoning?

A. The daughter.

The Court: The first one called was Dr. Gayl. Did you ask whether it was the first doctor?

[fol. 122] Mr. Heebner: Yes, sir.

The Court: Dr. Gayl was called first, and then Dr. Tomlinson?

The Witness: It was Dr. Tomlinson. I recall the name now.

By Mr. Heebner:

Q. It was Dr. Tomlinson?

A. That is right.

Q. Who put in the call for Dr. Tomlinson?

A. The girl looked it up in the telephone book, and she got his address and the engineer called the doctor.

Q. When you first saw Mr. Myers, as you said leaning against the side of the car, which car was that?

A. The seventh car we had coupled up.

Q. And you were on which side of track No. 2?

A. The left hand side facing the river.

Q. That would be between track 2 and track 3?

A. That is right.

Q. Had you seen Mr. Myers before you went to work that night?

A. Yes, sir.

Q. Where did you see him before you started?

A. At the starting place, at Thompson Street.

Q. And what time was that?

A. Our regular starting time, 6:30.

Q. Did you notice his condition at that time, or did he say anything to you?

A. He told me he wasn't feeling well.

Q. Nevertheless, he went to work?

A. Yes.

[fol. 123]. Q. Now, Mr. Kelleher, who gave you orders for the movement of these cars?

A. These seven?

Q. These seven cars?

A. Mr. Myers.

Q. Was he the one from whom the crew took orders as to when they were to couple and uncouple?

A. He gave the signals,—he didn't give it by word of mouth. After all, that is the way we work,—by signals.

Q. After the coupling was made with the three cars that were standing on No. 2 track was there any further move made by the locomotive or the draft of cars?

A. No, not after coupling.

Q. How far were you from Mr. Myers when you saw him climb down the side of the car?

A. I would say seven cars. I was about the end of the fourth car.

Q. You were about three car lengths away?

A. About three car lengths away from Mr. Myers.

Q. Could you see as far as the bumper?

A. I could see it if there was no cars there.

Q. It was still daylight?

A. Yes, about 9:00 o'clock.

Q. Were you passing signals by the use of lanterns or hand signals?

A. Well, I didn't use my lamp as yet, but Myers had got his lamp, but I could see Myers very plainly.

Q. Could you also see the fireman on the engine?

A. Yes.

Q. As far as the movement of the draft is concerned, you were the middle man to pass the signals?

A. In that particular spot.

Q. How was Mr. Myers taken from the point where you found him to the point where he was placed in the automobile?

A. I don't understand that.

[fol. 124] By the Court:

Q. After you found him, how did you take him away?
A. By automobile.

By Mr. Heebner:

Q. How did you get to the point where the automobile was?

A. We carried him, as I said before, to the engine, uncoupled the engine, and we held him on the step and took him about half a square to Thompson Street, and we carried him from there to the automobile.

Q. I thought I understood you to say when you first saw him he made a complaint about feeling sick at his stomach?

A. That is right.

Q. He wasn't unconscious then?

A. No.

Q. Was this the only time that you saw Mr. Myers on top of the coal car during this particular movement?

A. Yes.

Mr. Heebner: Cross-examine.

Cross-examination. (N. T. pp. 148-153 inc.).

By Mr. Richter:

Q. Have any trouble, Mr. Kelleher, in carrying the plaintiff back to the point where you put him on the engine?

A. Well, we had to carry him between two rows of cars, and it was a little awkward carrying the man without a stretcher.

[fol. 125] Q. How much space did you have between these two tracks with the cars on them?

A. What did you say?

Q. How much space did you have between these two tracks with the cars on them?

A. Well, it is very narrow there. I couldn't stand up this way (indicating), I would have to stand like that (indicating), at 45 degrees in order to get out at that particular spot.

Q. These tracks take a curve?

A. Yes, sir.

Q. And there were two or three cars already on the tracks?

A. Yes, sir.

Q. Were the three cars up against the bumper or a car length or more to the west?

A. I wouldn't know.

Q. How long a distance is it straight, due east, after the cars were put on the tracks, Mr. Kelleher?

A. What distance?——

The Court: From where to where?

Mr. Richter: From the bumper, going west along that track, how much space is it straight?

The Witness: I would say three cars was straight, and then from the seventh car it started a gradual tilt or curve.

By Mr. Richter:

Q. The tilt straightens itself, until it is almost to 90 degree angle, going west? As you go east and west, and then it sort of goes north and south?

A. I don't quite understand.

[fol. 126] Q. Perhaps I can show it better by the photograph.

A. Here is the photograph. (Producing same.) At this point it is practically straight (indicating). I would be standing here (indicating), and the three cars would be here (indicating).

Q. Then the track takes a real turn?

A. Yes, quite a turn.

Q. The plaintiff was on the east end of the next to the last car that was being pushed in?

A. He was on the end car.

Q. That was being pushed in?

A. That is right.

Q. You were up near the engine?

A. No——

Q. How close were you to the engine?

A. I said how close I was.

Mr. Richter: Will you repeat it, please?

(The reporter read the question as above recorded.)

The Witness: I was three or three and a half car lengths from the end of the seventh car.

By Mr. Richter:

Q. That would put you about four cars away from the engine?

A. That is right.

Q. As a matter of fact, you were really a car away from the engine?

A. No, I wasn't.

Q. Well, see what you said before this under oath. "How close were you to the engine?" "A car or so." Did you testify that way?

[fol. 127] Mr. Heebner: Well, now, what time are you asking about?

The Court: Probably you better ask him that question.

Mr. Richter: I think you are right, Your Honor. I will get down to that point.

By Mr. Richter:

Q. "And the cars made their coupling?" "Yes." "What did Myers do then?" "He got down." "He got down off the train?" "Yes." "Where were you all this time?" "In the same position that I told you, between two and three."

That is with reference to the tracks.

"Where in relation to the engine; were you alongside of the engine?" "No, I was a couple of cars from the engine." "Were you walking with the train as it was moving?" "No, I was standing." "Were there trains passing you?" "Yes." "Did you see them come to a stop; at the time they came to a stop, were you even with the engine?" "Not quite." "How close were you to the engine?" "A car or so."

Now, did you testify that way?

A. That is right.

Q. If that were true then, that would make you at least 300 feet from the plaintiff?

A. I said a car or so. I thought the matter over, how many cars we had since that, and I realized that wasn't just right.

Q. You knew you had seven cars when you were testifying?

A. Yes.

Q. So that there is no change in your knowledge as to [fol. 128] how many cars there were in the group of cars you were pushing in?

A. No.

Q. As a matter of fact you were 300 feet away from where the plaintiff was around the bend, and yet you want

His Honor and the jury to believe in that narrow space where you had to walk edgewise you could see the plaintiff get off the side of the car at that time of the night?

A. That is right.

Mr. Heebner: That is all.

By the Court:

Q. Well, were you 300 feet away?

A. I didn't measure the length of the cars. As I said, about four cars,—that would be from the front of the engine, and the engine takes a distance of a coal car.

Q. He is asking how far away you were from Mr. Myers?

A. A distance of three cars.

The Court: You said three or three and a half cars.

Redirect examination. (N.T. p. 153).

By Mr. Heebner:

Q. These are all hopper bottom coal cars?

A. That is right.

Q. And how long were these cars?

A. Offhand, I would say they were about 25 feet or 20 feet,—20 or 25 feet, in that neighborhood.

Q. And three or three and a half cars would be——

The Court: He said he was about three or three and a half car lengths away. I believe the picture shows a car. It is a car like that?

[fol. 129] Mr. Heebner: Yes, Your Honor.

By Mr. Heebner:

Q. Look at plaintiff's Exhibit 2 there, is that the top of the car that was there?

A. That is right.

Q. And all the cars on No. 2 track were of that same type?

A. Yes, sir.

Q. Including those standing near the bumper?

A. That is right.

Recross examination (N. T. pp. 153, 154, 155).

By Mr. Richter:

Q. You know there are no hopper coal cars that run 30 feet,—they are between 40 and 50 feet in length, you know?

A. Offhand, I don't think so. I don't think they are quite that long; I would say 25 feet.

Q. Will you please produce for me——

The Court: He may be wrong——

Mr. Richter: I should say he is.

The Court: I don't know, but it is two or three car lengths.

By Mr. Richter:

Q. Of course, according to your original testimony the car that was farthest from the engine,—he would be six car lengths away?

[fol. 130] A. What is that?

Q. Since you say that the plaintiff was on the last car, and you were a car away from the engine, he would be at least six car lengths away from you?

A. I don't know——

The Court: He didn't say he was a car from the engine—don't argue with the witness. Ask him questions.

By Mr. Richter:

Q. You did say, did you not, that the plaintiff was on the last car as they were coupled up?

A. That is right.

Q. You did say on a previous occasion when the train came to a stop after the coupling was made you were only a car or so away from the engine, didn't you?

A. Yes, I recall that is right.

Q. That would have you at least six car lengths away from the plaintiff, Mr. Myers?

A. From the first testimony I gave, yes, that is what I said, but I realized I was much further than that away.

By the Court:

Q. Further from the engine?

A. Further from the engine.

By Mr. Richter:

Q. Who was passing the signals to the fireman?

A. I dropped back, due to the fact that this man was new, to make sure that the fireman would get my signals direct; I dropped back, and I was passing the signals; I don't know what the extra man was passing. I was giving my signals direct to the fireman.

[fol. 131] Q. You don't know whether the extra man was passing signals to move the train, do you?

A. No, I don't—

Mr. Richter: That is all.

Redirect examination (N. T. p. 156).

By Mr. Heebner:

Q. You never measured one of these coal cars?

A. No,—just offhand.

Mr. Heebner: All right.

Mr. Heebner: Mr. Hinkle.

Daniel C. Hinkle, having been duly sworn, was examined and testified as follows:

Direct examination (N. T. pp. 156-161, inc.).

By Mr. Heebner:

Q. Mr. Hinkle, on July 11, 1944, you were employed by the Reading Company, were you not?

A. That is right.

Q. In what capacity?

A. Brakeman.

Q. How long had you been employed at that time?

A. I would say about two or three months.

Q. Have you left the Reading Company employ?

A. I have left the Reading Company employ, yes, sir.

[fol. 132] Q. And where are you working now?

A. The RCA Company, Camden.

Q. Mr. Hinkle, will you look at photograph P-1, and tell us if that recalls anything to you about the work you were doing on the night of June 11, 1944?

A. (Examining same) That is right.

Q. You recognize the location shown in that photograph?

A. Very definitely.

Q. And where is it?

A. That is track 11.

Q. Pier 11?

A. Pier 11, I mean, Port Richmond.

Q. It shows tracks 1, 2, and 3 on it?

A. Yes, sir.

Q. On that evening it has been testified there was a

movement made on No. 2 track by the Diesel engine, with six or seven cars; do you remember who was with you, the members of the crew that night?

A. Mr. Kelleher, Mr. Myers; myself; and the engineer and fireman. If I remember correctly I was a little late for work. I arrived there, I imagine, about a quarter to seven.

Q. Where did you go to work?

A. Why, down to Port Richmond, on the level. It is very level there, and that is why they call it that. Of course, I didn't know Mr. Myers, that was my first job with him. I was talking to the dispatcher and he said Mr. Myers——

Mr. Richter: I object to that.

The Court: No, he can't tell what he said.

By Mr. Heebner:

Q. Where did you go,—where did you meet the crew?

A. The train was around the curve, on the level, going, I believe, south to pick up a draft of cars.

Q. Was this before the movement was made on track 2?

[fol. 133] A. Yes, this is when I first came to work.

Q. Were you on the Diesel engine before this accident occurred?

A. Oh, yes.

Q. Getting down to the point where your operation started, for the time being,—there was a movement made on No. 2 track, eastward?

A. Yes, sir.

Q. Where were you when that move was made?

A. I was right on the side of one of the cars. Mr. Myers was at the head of the train going in, and I was in between Mr. Myers and Mr. Kelleher.

Q. That is, you were between them?

A. I was between them, to pass the signals.

Q. On which side of track No. 2 were you?

A. I was on the right hand side, the engineer's side?

Q. The right hand side?

A. The right hand side.

Q. The track curves to the left toward the river?

A. Yes, I was instructed I should ride partly on top of the coal car so I could pass these signals to the brakeman.

Q. You were on the locomotive?

A. No, I was on the cars being pushed back so I could see Mr. Myers.

Q. And where was he?

A. Mr. Myers was at the head of the cars going in, the first car.

Q. On the car or on the ground?

A. No, he was on the first car. I could see his signals to pass back. Mr. Kelleher was in back of me between myself and the engine. As we pushed the cars back we were making the coupling, and after that—I was a little green,—and I walked back to see Mr. Myers to see what I should do.

Q. That is, you walked toward the river?

A. Yes, sir.

Q. How many cars were there on the tracks that you coupled to?

[fol. 134] A. Three, I should say.

Mr. Myers told me to check the coupling to the engine to see that there was no lines broken, and he stopped and wrote the numbers down.

Q. Which car was that where he was then?

A. I believe that was opposite No. 7 car,—between 7 and 8.

Q. From the engine or——

A. From the engine.

As I was walking down checking each coupling I met Mr. Kelleher, and he went down and looked and said the lines were all right through the train. In the meantime, I walked back near Mr. Kelleher, and we found Mr. Myers on the ground.

Q. Between the time the coupling was made and the time you found Mr. Myers, had the draft of cars of the locomotive moved at all?

A. Positively not,—there was no signal given, and there wasn't the slightest movement of any kind.

Q. Did you see Mr. Myers on top of the car after the coupling was made?

A. No, I did not. I was talking to Mr. Myers on the ground while he was writing the numbers; he was complaining of being ill then.

Q. Did he say anything to you earlier?

A. When I first came to work, I was standing on the side of the car, and he complained of pain in his stomach when we were going to get this other traffic.

Mr. Heebner: Cross-examine.

[fol. 135] Cross-examination (N. T. pp. 161-164, inc.):

By Mr. Richter:

Q. You were the only man of the crew who didn't appear in my office and give his deposition?

A. That is right.

Q. Where do you live?

A. Haddonfield, New Jersey.

Q. Did you live in Pennsauken at one time?

A. I certainly did.

Q. You walked with Mr. Kelleher after watching the plaintiff take down the numbers of the cars?

A. That is right.

Q. That is his regular job, to make note of the cars on the train?

A. Yes, sir.

Q. And he was doing that?

A. Yes, he was doing that.

Q. What did you do then,—start to walk toward the engine?

A. We made the coupling, and I had to check the line to see they are not broken——.

Q. And you were checking the line?

A. I was checking the line.

Q. And did you thereafter meet Mr. Kelleher?

A. I met Mr. Kelleher two or three car lengths away.

Q. That is from the place where the original coupling had been made?

A. No, I was further down on the draft; I must have been at least ten cars, or seven or eight cars from him.

Q. From whom?

A. From Mr. Myers.

Q. In other words, you walked toward the engine?

A. No, I was waiting for Mr. Myers to come up to me. We always do that when we finish the draft.

[fol. 136] Q. Where were you while you were waiting for Mr. Myers?——

A. I was talking to Mr. Myers and he said he checked the couplings, and go on back.

Q. And you were walking back toward the engine?

A. That is right.

Q. And you walked back about seven cars from him?

A. Seven cars from Mr. Myers you mean?

Q. Yes.

A. Not quite, because Mr. Myers had walked up to me.

Q. How many cars did you walk away from Mr. Myers?

A. I would say Mr. Myers, he had walked three car lengths.

Q. In the meantime you had been walking toward the engine?

A. No, I was waiting to get my instructions from Mr. Myers.

Q. How close to the engine did you get?

A. I was walking, and Bill was walking toward me——

Q. Who is Bill?

A. Mr. Kelleher.

Q. You had not worked with Mr. Kelleher before?

A. Never.

Q. Or since then?

A. Never have.

Q. Then you started to walk back with Kelleher?

A. Yes.

Q. So that you were at all times closer to Myers than Kelleher was?

A. No, we were side by side.

Q. You didn't see Mr. Myers come down from the side of the cars, did you?

A. I wasn't paying that much attention to him.

Q. As a matter of fact, you couldn't because there is a bend there?

A. There was a slight curve.

[fol. 137] Q. That is the reason you would not be able to see him from the position you were at?

A. I believe you could.

Q. But you didn't see him?

A. I was talking to Mr. Myers.

By the Court:

Q. Getting down to the time when Mr. Myers got hurt, the last time you say Mr. Myers before you saw him on the ground, where was he?

A. He was standing alongside the cars checking numbers.

Q. From that time on did you ever see him up on the

cars again? Between the time he was checking the cars and the time you found him on the ground?

A. No, I don't remember.

Mr. Richter: That is all.

Mr. Heebner: Thank you.

Mr. Richter: One of the doctors is on his way, and will be here at 3:00 o'clock. I can get him back tomorrow morning.

The Court: Better have him at 3:00 o'clock.

Mr. Richter: He said he would be here promptly at 3:00. I didn't think we would get through quite as soon.

The Court: I understand there are several soldiers to be naturalized—this is off the record.

Now, members of the jury; one of the physicians will be here at 3:00 o'clock, and we will take a recess until that [fol. 138] time. If he comes before that, I wish you would notify me and I will notify the jury.

Mr. Heebner: Yes, sir.

(Informal recess.)

Mr. Heebner: Dr. Yaskin, will you take the stand, please.

Dr. Joseph C. Yaskin, having been duly sworn, was examined and testified as follows:

Direct examination (N. T. pp. 165-168 inc.).

By Mr. Heebner:

Q. You are a physician practicing in the City of Philadelphia?

A. I am.

Q. A graduate of what institution?

A. Medico-Chi, 1914, and University of Vienna, 1928.

Q. You have been practicing how long?

A. Including my internship, since 1914; I was in the Army for almost two years.

Q. You are still in active practice?

A. I am still in active practice.

Q. And specialize in——

A. Nervous and mental diseases.

Q. What is your present position, Doctor?

A. I am one of the chiefs of the Philadelphia General Hospital, Graduate Hospital, and Professor of Neurology, University of Pennsylvania.

Q. Did you examine the plaintiff in this case, John Myers, at my request?

[fol. 139] A. I did.

Q. When did that examination take place?

A. I examined him on the 19th of this month.

Q. Will you tell His Honor and the members of the jury what examination you made?

A. The examination consisted of taking the usual history, past and present, and making a complete physical examination. Weight was 140; pulse normal; teeth were absent.

The somatic examination was negative, that is, examination of the heart and abdomen, they did not reveal any abnormality that I could detect through my various senses and observation.

Examination of the back. The only observation was a slight curvature, which is not unusual in the so-called normal individuals, and there was very slight muscle spasm when the patient proceeded to bend forward. However, in all other directions the movements were full and some of the specific tests, such as Lasegue's sign, that is, elevating the entire lower limb and bringing it at right angles to the trunk, was negative.

Q. By that you mean that could be performed normal?

A. That is right. That is, I could bring his limbs at right angles to his trunk, in a lying position, so that we know there was no involuntary resistance to certain groups of muscles.

The neurological examination of the nerves of the head, trunk, and limbs was completely negative.

There was a little curvature of the left little finger, but there was no evidence of any weakness or anesthesia of the structures of the left hand.

Q. Would you say, from your examination, that the man was in a condition now that he could do normal work?

A. I would say that he would be in a condition to do normal work, barring perhaps some heavy lifting for a short time until he becomes accustomed to the procedure of being subjected to continuous exercise.

I can state with certainty he has no organic disease of

[fol. 140] the nervous system. There is no pressure on the spinal cord or large nerves known as roots.

I can also state that he has no involvement of the left ulnar nerve, which is very easy to locate and identify. And I can state with reasonable certainty he has no major back disability.

Q. Is there anything you would suggest that could be done to completely restore the condition of his back so that he would be free from what spasms there are at this time?

A. There are two ways of treating backs of this sort. One is to give the patients baking and massage and at the same time to subject them to ever increasing activity. As the result of the two procedures individuals of this type usually make complete recovery.

Q. What length of time do you think that would take?

A. I would say the combined effects of work and some physio-therapy should bring about maximum improvement within three to six months.

Mr. Heebner: Cross-examine.

By the Court:

Q. In three to six months he can do heavy lifting?

A. I think so. I am making that statement because there is nothing to indicate any major disability from muscles or bone standpoint, and he has, definitely, no impingement on the spinal cord or large nerve.

Mr. Richter: No questions.

Mr. Heebner: If Your Honor please, I have Dr. Rechtman, and then I am through, but as I told Your Honor, Dr. Rechtman cannot be here until tomorrow, and his testimony will be very brief.

[fol. 141] *Discussion*

The Court: Members of the jury, we have another surgeon who is operating on a case today, and there is absolutely no way of getting him here. Counsel tried everything they could—neither the Court or either of counsel are anxious to delay this hearing, no more than the members of the jury are, but there is nothing left for us to do except to recess until 10:00 o'clock tomorrow morning. I think we can complete this case tomorrow—

it looks that way. So, you may be excused until 10:00 o'clock, and remember the admonition that I gave you yesterday when we separated.

(Whereupon at 3:06 o'clock P. M., an adjournment was taken to Thursday, May 24, 1945, at 10:00 o'clock A. M.)

Philadelphia, Pa., May 24, 1945.

Before Hon. Guy K. Bard, J., and a Jury.

Appearances:

B. Nathaniel Richter, Esq., for the plaintiff.

Henry R. Heebner, Esq., for the defendant.

Third Day.

The Court: All right, we will begin.

[fol. 142] Defendant's Evidence.

(Continued.)

Mr. Heebner: Dr. Rechtman, will you take the stand.

Dr. Abraham Rechtman, having been duly sworn, was examined and testified as follows:

Direct examination. (N. T. pp. 171-174, inc.).

By Mr. Heebner:

Q. Dr. Rechtman, you are a practicing physician in the City of Philadelphia?
A. I am.
Q. A graduate of what institution?
A. Temple University, 1921.
Q. Have you practiced here ever since?
A. That is right, sir.
Q. Connected with any hospital in this city?
A. On the teaching staff of orthopedic surgery, Jeffer-

son Medical and in charge of orthopedic surgery at the Jewish Hospital.

Q. Do you specialize in any particular branch of medicine?

A. Orthopedic surgery.

Q. Did you, at my request, examine John Joseph Myers, who is seated here next to this lady (indicating), recently?

A. I did, on May 15.

Q. Will you tell His Honor and the members of the jury the result of your examination, what you found, and what his condition was at that time?

[fol. 143] A. I was told that this patient's trouble was in the back and left hand. My examination was practically normal in every respect except for some poor posture of his back. The patient was first observed walking; he walked without limping. He was undressed for his examination, and was first examined while lying on the table on his back and then on his abdomen; then lying on the right and the left sides, carrying out certain tests, moving the back and legs through all the normal ranges of motion. That was possible in every way and in every respect but in each motion the patient complained of discomfort at the same place, indicating the site was in the lower back in back of the pelvis, the mid portion, and for two or three inches above that area.

When he was tested for tenderness to pressure, he complained of discomfort in an area on a line between the iliac crests, at the buttocks, on both sides extending to the lower border of the ribs—through that square or rectangular area. Any place touched in this area he said discomfort was present, the same on the right as on the left.

The patient was next examined in a sitting position. He sat in a slouched attitude. There was no spasm of the muscle. Again his motion was normal, whether he bent forward, to the right, or to the left, or backward, but with each one of the motions he said he had pain at the same place.

He was again examined in a standing position and once more the same motions were gone through. In fact, the patient was quite supple, and referred to pain in the same site.

The reflex tests on the nerves to the lower extremity were entirely normal.

Circulation was normal.

There was a marked degree of flat feet, with knock-knee that he has had for many years, and had nothing to do with the injury.

There was no disturbance of sensation. He complained of no discomfort in the lower extremity.

I examined his left hand and compared it with the right. [fol. 144] The examination was entirely normal in every respect. The patient said he couldn't straighten the third and fourth fingers, although this condition was better than previous. He said the trouble was at the end, but on examination he could extend and close the fingers normally. The circulation was normal. He said there was some disturbance in the sensation of the two fingers, and when I tested the sensation he said there was no sensation at all, and on retesting he said he had greater feeling in the right than in the left, and then he said the sensation was normal.

The back showed nothing different from normal other than this posture which I previously mentioned.

Q. What would you say as to his ability to work, to do normal work—for a man who has been engaged in the railroad business previously?

A. There was nothing in the examination to suggest that this patient could not do anything he was capable of doing previously.

Mr. Heebner: Cross-examine.

Mr. Richter: No questions.

Mr. Heebner: Thank you, Doctor.

Mr. Heebner: That is the defendant's case, if Your Honor please. I will hand up a point, and rest. (Presenting same.)

The Court: How much time do you gentlemen want?

Mr. Richter: I think I would be able to cover the subject adequately in about thirty minutes.

[fol. 145] The Court: All right, we will give you thirty minutes.

(Opening argument to the jury on behalf of the plaintiff by Mr. Richter.)

(Argument on behalf of the defendant by Mr. Heebner.)

(Reply argument on behalf of the plaintiff by Mr. Richter.)

The Court: Now members of the jury, we will give you a short recess before I charge you. We will call you back in five or ten minutes.

(The jury retires.)

May I see counsel a minute, please.

(Conference at side bar.)

The Court: All right, if you will call the jury in.

(The jury returns to open court.)

[fol. 146] CHARGE OF THE COURT

BARD, J.

Members of the Jury:

The plaintiff in this case is John Myers. The defendant is the Reading Company, a railroad corporation, doing business as an interstate common carrier of passengers and freight.

You have listened very patiently and attentively to the evidence as it was presented from the stand and the able argument which was presented to you by both counsel. This case has been presented to you by both counsel in an able and skilful manner, and the duty now develops upon you to find a fair and just verdict between these parties in accordance with the law and the evidence.

The plaintiff claims damages from the defendant for injuries which he claims he received because of the negligence of the defendant, its agents, servants or employees, and because of an inefficient hand brake on one of the defendant's cars. The defendant company denies that either through its agents, servants or employees, or otherwise, it was negligent or that it was in any way responsible for the injuries alleged to have been suffered by the plaintiff. It is therefore your duty, members of the jury, to determine who or what was responsible for the injuries which the plaintiff alleged he suffered. In determining that issue you are the sole judges of the facts, and must determine what the true facts are. Unlike the facts, you must accept the law as this Court gives it to you, other-
[fol. 147] wise you might have twelve different versions of the law when you retire to consider the case.

The plaintiff contends that on June 11, 1944, he was employed by the defendant as a conductor, and was working in the defendant's yards at Port Richmond, Phila-

delphia, when, due to the negligence of the defendant, its agents, servants or employees, he was thrown from the top of a coal car and sustained severe, painful, and permanent injury.

He alleges that the defendant by its agents, servants or employees, was negligent in failing to give notice or warning of the intention to move the train from which he fell, and in moving the train without due regard for the point and position in which he was working, and in violating the rules of the Company in failing to ring the bell or blow the whistle before moving the train, and in supplying a defective brake upon the freight car from which he was thrown.

The defendant, on the other hand, denies that it was negligent, and denies that the plaintiff suffered any injury as the result of its negligence or the negligence of any agents, servants or employees, and it denies that there was any defect in any brake or equipment of any of the cars from which the plaintiff fell. It further denies that it violated any rules of the Company or any other lawful rules or regulations.

This action has two phases, brought under different Acts of Congress, known as The Federal Employer's Liability Act, and the Safety Appliance Acts.

In the one phase, the plaintiff charges that a fellow employee was negligent in signaling for a movement of the train without first knowing the whereabouts of the plaintiff, and without giving any notice to the plaintiff either by blowing the whistle or ringing the bell. And the other phase, the plaintiff charges the defendant with equipping one of its cars with an insufficient hand brake. Under the Safety Appliance Acts it is the duty of all common carriers engaged in interstate commerce to equip all cars with efficient hand brakes, regardless of mechanical [fol. 148] defects. This duty is absolute. If an employee is injured due to an insufficient hand brake he can recover damages for such injuries. This is so even if the plaintiff was guilty of contributory negligence, because contributory negligence is not a defense where a violation of the Safety Appliance Acts is involved.

Under the Federal Employees' Liability Act, the other act, the railroad is liable in damages for any injury resulting in whole or in part from the negligence of any officers, agents or employees, or by reason of any defect

or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed or other equipment. Under that Act, therefore, if a railroad employee suffers injury as a result of negligence of any fellow employees the plaintiff may recover such damages as may be awarded under the instructions which I shall give you. In cases where negligent conduct, both by the injured employee and his fellow employees—and you will remember that the act of any fellow employee is the act of the defendant railroad—there may still be recovery by an injured employee, but in such circumstances the amount of damages which the injured employee may have been entitled to if he had not been negligent must be reduced by you members of the jury in proportion that the extent of the negligence of the injured employee was responsible for his own injury. Where a negligent act on the part of the injured employee is the sole proximate cause of his injuries without any contributing actions on the part of the employer or fellow employees the injured employee would be denied altogether a right of recovery under the Federal Employees' Liability Act. Under the Federal Employees' Liability Act therefore, the plaintiff here has a right of action only if his damage was caused by some negligence of the Railroad Company. As I said to you before when I say to you the Railroad Company I mean, as well, any employee of the Railroad Company other than the plaintiff. Therefore, under this phase of the case unless you find that there was negligence by the [fol. 149] Railroad Company and that such negligence contributed or caused the plaintiff's damages your verdict must be for the defendant. In other words, before there can be any recovery by the plaintiff under this phase of the case you must find that there was some negligence—some negligent conduct—on the part of the Railroad or its employees working with the plaintiff. If under this phase of the case you find that the defendant or any of its employees other than the plaintiff was negligent, and that the plaintiff, Myers, was also negligent, then your verdict would be for the plaintiff reduced, however, by such amount as you believe fairly represents the contribution made by the plaintiff toward his own injury. In other words, if you find that Myers was negligent and that some other person employed by the Railroad was also negligent and that as a result of this combined negli-

gence the plaintiff suffered injuries then your verdict would be for the plaintiff reduced, as I said, by the contribution made by the plaintiff to his own injury.

In such a case as this an employee, such as Mr. Myers was, shall not be held to have assumed the risks of his employment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of the Railroad Company; and no such employee shall be held to have assumed the risk of his employment in any case where the violation by the Railroad of any statute enacted for the safety of employees contributed to the injury of such employee.

In one phase of this case the plaintiff charges the defendant, acting through its agents, servants or employees, with negligence. Negligence is want of due and proper care under the circumstances; it is the doing of something that an ordinarily prudent man would not do under the circumstances, or it is the failure to do something that an ordinarily prudent man would do under the circumstances. The word "negligence" as used in this case really means whether the Railroad or any of its employees were at fault, and if so, whether such fault contributed to the injury of the plaintiff.

[fol. 150] In every negligence case and every suit in which the plaintiff claims damages by reason of injury suffered on account of negligence on the part of the defendant the burden is upon the plaintiff before he can recover to prove by a fair preponderance of the evidence that the defendant committed some act or failed to perform his duty which resulted in injury to the plaintiff.

It is admitted that on June 11, 1944, the defendant was engaged in interstate commerce, and that on that date the plaintiff was employed by the defendant as a conductor and was working in the defendant's yard at Port Richmond, Philadelphia.

Let us review some of the testimony as it was given from the witness stand. In this review of the evidence I may err in my recollection of what was said or my review may be at variance with your recollection of the testimony, but it is your recollection of the testimony that will govern and control, and not what I tell you.

John Myers, the plaintiff, testified that he is married, and the father of three daughters ranging in age from 10

to 16 years. That on June 11, 1944, he was employed as freight conductor by the Reading Company, the defendant; his wife is also employed by the defendant company on a Diesel freight engine. The plaintiff was a member of a shifting crew. In that crew beside himself as conductor, were the engineer, fireman, and two brakemen. Hinkle, one of the brakemen, was working his first day on the railroad. The plaintiff said that he was boss of this train crew, and they were classifying coal cars at that time, and he received orders from the yardmaster, and gave them to the train crew. At this time he worked seven days a week and not less than twelve hours a day, and I think he said sometimes he worked 16 or 18 hours a day. That he was engaged with this crew, on June 11, 1944, at about 9:30 in the evening, and was carrying a lantern or a lamp. He said with the engine running in a forward direction they were pushing in front of the engine seven coal cars that [fol. 151] they intended to couple with three coal cars that were standing in the yard. He said that Hinkle coupled these seven to the three already standing there, and then the plaintiff told Hinkle to tighten the hand brakes on top of the car or cars. There was a steel bumper to hold the cars, and beyond the bumper a slope of 25 feet to the river, and below that the Shore Road, and then the Delaware River. He said the air hose were coupled, and then Hinkle went up to set the brakes. Plaintiff said he checked the brakes to see if Hinkle had set them properly, and I think on the sixth car from the engine the brake chain was hanging loose, which meant that the brake was not set; the plaintiff then went on the brake step to tighten this wheel. He had his lantern hanging from his left forearm, and was tightening the hand brake with the right hand and also using his left hand. This particular brake was stuck with a high spring, and the wheel kicked back. Plaintiff had not given orders, permission, nor a signal to move the train. As he was tightening the hand brake he felt a jar which was caused by a slight movement of the car toward the east, or toward the bumper; with his left arm he signaled with the lantern to stop the movement and the brake wheel kicked back, throwing him to the ground a distance of about eight feet. He was dazed. He says then they took him home. He felt sore in the lower back and spine, and had a bruise on the left hand, and felt

sore all over; he couldn't sleep; and in a few days Dr. Gayl treated him for his back and his spine, and gave him treatment for several weeks. On July 1 he was sent to St. Joseph's Hospital under the care of Dr. Lefkoe, and was in that hospital eleven days. He said his finger swelled up; that it was in a bent position and he wasn't able to straighten it. They put weights on his feet, and he had pain in his back; he couldn't lift anything heavy, nor bend.

In September he tried to get a job at the Philadelphia Transportation Company, and was only able to work two or three days; he worked there about a month, and averaged $16 to $20 a week. With the defendant company, [fol. 152] previous to his injury, he earned $120 to $125 a week. He had to bend, and could hardly stand up after several hours working as motorman.

In November he obtained a job as fireman with the Pennsylvania Railroad, and worked for two days but couldn't bend to shovel coal, and felt stiff and sore, and had pain in the spine and couldn't stay there. After a week he went back to the Philadelphia Transportation Company, and from October worked, off and on, for that company until early of this year. He is not working now.

He said that later he was treated by Dr. Jepson, who prescribed a special belt and some appliance in his bed, and special shoes. His finger has improved, he testified, so that it is now normal.

He said that the rules of the company were that before a train moves in the yard—and he read the rule here—they must ring the bell, and if the engineer is waiting for a signal, he must blow the whistle. He said that he gave no signal for the train to proceed, and he said the regulation of the company says that before a signal is given, the person giving it must know where every other member of the crew is situated.

On cross-examination he denied he made any complaint about not feeling well before he started to work on that evening.

Catherine Myers testified she is he wife of the plaintiff; that on the evening of June 11, 1944, his left hand appeared to be dislocated, and that a number of men carried him upstairs in their home. She said that his health was good prior to June 11, 1944, and that after that date his fingers were crippled and were swollen for a period of

three months. She massaged his back two or three times a day.

John Myers, the plaintiff, was recalled to the stand and read to you rules 30, 31, and 32, of the Reading Company, which said that the bell on the engine must be rung and the whistle must be blown when required by law, and that unnecessary use of the bell is forbidden.

[fol. 153] He said that he wanted to correct some former testimony, and said that he was employed by the Pennsylvania Railroad in February, 1945, rather than in October, 1944.

Dr. Joseph C. Gayl, a physician, said that he examined the plaintiff at his home on June 12, 1944, the day after the accident. The plaintiff was in bed and complained of pain in his back. Plaintiff told him he had fallen off a car. Plaintiff came to Dr. Gayl's office six times later and that he used electric heat or diathermic treatments. He seemed not to respond, and Dr. Gayl sent him to the orthopedic clinic at St. Joseph's Hospital. Dr. Gayl said that the plaintiff did not complain of anything else beside his back, and did not recall any abrasions on the plaintiff's body, and that the plaintiff did not complain about his left hand. Dr. Gayl's bill for services was $21.00.

A letter from the Pennsylvania Railroad was introduced in evidence setting forth that the plaintiff was employed by them from February 1 to March 20, and again in April, and earned a total of $135.11.

Frank C. Wilgus testified that he is assistant supervisor of the Payroll Department of the Philadelphia Transportation Company, and that the plaintiff was employed as student beginning September 2, 1944, and that he started to work on October 2, 1944, and resigned on May 2 of this year. During that time he received total wages amounting to $808.33.

Dr. George Milton Tomlinson, a physician, said that he was called to the plaintiff's home, but did not know who called him; that he examined the plaintiff on the night of June 11, 1944, the day he was injured, and found the plaintiff quite dazed and also very weak, and that the plaintiff was in a sub-normal condition. He testified that the pulse was sluggish, and his skin cool, and that even today, the date on which he testified in court, the plaintiff did not have the best of complexion. He said that the plaintiff informed him he had been working 18 hours in a stretch,

and that he had tenderness and pain in the back. Dr. [fol. 154] Tomlinson said there was nothing wrong with his left hand, and that his tender or sore back was part of his whole condition. Dr. Tomlinson said that the plaintiff was suffering from neurasthenia, which meant a complete let-down of his system, and that the man was in a state of exhaustion. He said there were no cuts or bruises on his body, and plaintiff had made no complaint about his left hand.

Dr. Paul N. Jepson, a specialist in orthopedic surgery, testified that he examined the plaintiff on November 16, 1944; the plaintiff complained of numbness of the fourth and fifth fingers of the left hand, and that on examination he found there was a 15 per cent flexion deformity of one of the fingers of the left hand. That plaintiff complained of pain in the back. Dr. Jepson prescribed a fracture board and shoes with special pads. He examined him several times, the last time I think on Tuesday of this week. His left hand is better and he has normal grip in the left hand.

Dr. Jepson said at the present time he would consider the plaintiff recovered from his injury if there was not some restriction of motion in his back. He said that the plaintiff complained of low back strain, and that he has muscle spasm in the back, and that the muscles stand out like a cord. He said that the plaintiff had ulnar palsy, or paralysis, in his left hand and arm, and that there was a shortening of one leg which, however, he said, was a natural congenital condition. In the history that the plaintiff gave to Dr. Jepson, he told Dr. Jepson in getting down from the car he got unconscious. The history as Dr. Jepson has it recorded in his notes did not say that the plaintiff had told him that the train of cars had moved at that time. Dr. Jepson's bill was $55.00.

Miss Florence M. Shea testified that the plaintiff earned from the Reading Company, the defendant, the sum of $2,027.86 from January 1, 1944, to June 11, 1944, the date of this accident.

Miss Elizabeth Carty testified that the plaintiff came for treatment to St. Joseph's Hospital on June 29, 1944, [fol. 155] and was a patient there from July 1, to July 10, 1944, and that the hospital bill amounted to $58.00.

Dr. Lefkoe, a specialist in orthopedic surgery, said he saw the plaintiff on the 29th of June, 1944, at St. Joseph's

Hospital. He said that the plaintiff complained of severe incapacitating back pain and that he suffered pain. Dr. Lefkoe found evidence of muscle spasm in his back, which he said was caused by irritation of the structures underneath, either to the bone or the ligaments. The plaintiff was in the hospital from July 1 to 10. The Doctor put him in bed, flat, with a board underneath the mattress, and attached a 10-pound weight to each leg. He saw him again on July 18.

The history given to Dr. Lefkoe on July 18 was that the plaintiff, about three weeks before, was putting the brake on a car and he twisted his body and something snapped with a sharp pain. Dr. Lefkoe said that a sudden fall with a twist could cause such muscle spasm, and it is generally accompanied by pain.

The defendant company called Milton D. Weisel, who testified that on June 11, 1944, he was employed as engineman by the Reading Company on the freight shifting train in the Port Richmond yard; Kiernan was helper on the engine, Kelleher was brakeman, and there was an extra man who has since been identified as Hinkle, and Myers, the plaintiff, was the conductor.

That night, Weisel, the engineman, said that he and some of the other men of the crew met in the brakeman's locker room at 6:30, and that time the plaintiff complained that he was feeling ill and was sick at the stomach, and was thinking of reporting off duty. There were two men short at that time, however, and the plaintiff went to work, and they were pushing six or seven cars toward the east. Weisel testified that he was on the south, or the right hand side, and got his signals from the helper, Kiernan, who was on the other side of the engine. Weisel said it was daylight at that time. These seven cars were coupled to the three cars standing on the track. The engineman [fol. 156] said that was the last move the train made. He said later Kelleher came up and reported to him that there was something wrong with Myers, and they went back and found Myers lying on the ground, and that he seemed to be dazed. They took the engine for a stretcher, found none, and then returned, and Kelleher carried Myers onto the engine, and the plaintiff asked to be taken to the hospital, because he was ill. He said the plaintiff was lying on the ground between tracks 2 and 3, and that the accident happened about 8:30 in the evening.

Edward B. Kiernan testified that he was helper on the Diesel engine; he thought when this accident happened it was dusk, and the conductor had a lamp for signaling. He said Myers was standing where the coupling was to be made, and after the coupling was made they stopped, and there was no further movement of the train. He said Hinkle and Kelleher called, and he and Weisel went back and found Myers lying on the ground groaning, and they later put him on the engine, and took him to the street and helped put him in the automobile. He said, in his opinion, it happened about 9:00 o'clock at night.

You will remember on cross-examination he was asked concerning certain questions he had answered previous to this trial, and you will remember just what his testimony was at that time and what it was on the stand, and it is for you to find just what his testimony is and what the true facts are.

William Kelleher testified that on June 11, 1944, he was employed as brakeman for the defendant; he said they went to work about 8:00 o'clock that evening. He said when the cars were being coupled Myers was on the far end up on the tow car. Kelleher then dropped back to see Myers after the cars were coupled; and that the cars had stopped moving. Myers came down on the ground. He said Myers, the plaintiff, walked toward Kelleher, on the ground, and leaned against one of the cars and slumped, and then went down on his haunches, and said [fol. 157] he had pain in his stomach. After that Kelleher said they took him as was described by Weisel. The plaintiff's daughter asked Kelleher to call Dr. Tomlinson. Kelleher said that evening before they started to work Myers, the plaintiff, said he was n't feeling well.

Kelleher was about three and a half car lengths away from Myers when the accident happened, and he said it was still daylight. He didn't have his lamp, but Myers, the plaintiff, had his lamp. Kelleher said he could see Myers plainly, and then described how they carried the plaintiff onto the engine.

Daniel C. Hinkle testified that he was employed as brakeman for two or three months with the Reading, but is no longer employed there. He said Myers, the plaintiff, was at the head of the cars going in; they made a coupling and the plaintiff then told Hinkle to check the various couplings. He said that after the cars were coupled none

of the cars were moved. He said that the plaintiff complained of being ill, and that the plaintiff was moving along on the ground checking the numbers of the car, and then slumped to the ground.

Dr. Joseph C. Yaskin, a physician who is a specialist in nervous and mental diseases, examined the plaintiff last Saturday; he said the plaintiff's pulse was normal; blood pressure a little low; nothing unusual with the heart or abdomen. He said the plaintiff's back showed a slight curvature, and when the plaintiff bent forward there was a very slight muscle spasm, but in all other movements of his body, such as lying down and raising his lower limbs the muscles responded normally. He said there was a little curvature of the left little finger. Dr. Yaskin said there was nothing organically wrong with the plaintiff and he is in condition at the present time to do normal work except that he may not be able to do heavy lifting for about three to six months. He said that if the plaintiff would receive physio-therapy baking treatments and increase his work from day to day he will be able to do everything, including heavy lifting, within the next three to six months.

[fol. 158] Dr. Abraham Rechtman, a specialist in orthopedic surgery, testified here this morning. He said he examined the plaintiff on the 15th of May of this year. Plaintiff told him he had trouble in his back and in his left hand. He said he examined him and found that the plaintiff is normal in every respect except he has poor posture, that he rather slouched when he stands or is seated. He said the plaintiff complained of discomfort at a point in his back, as you heard him describe. He said on his examination, however, when he was seated, that there was no spasm of the muscle. He also examined him when standing, and there was no spasm of the muscle, but that the plaintiff complained of pain. He said he tested the reflexes of the lower limbs and they were normal, and there appeared to be no disturbance of sensation. He said the left hand appeared to be normal, circulation normal, and he could open and close his fingers of his left hand. He said from his examination he could not see that the plaintiff was not able to do anything he had been able to do previously.

Now, certain exhibits have been introduced in evidence;

you will consider this evidence along with all the other evidence produced from the witness stand.

Now, members of the jury, that is a review of some of the testimony given in this case. If any of the testimony that I have discussed is at variance with your recollection of it, it is your recollection of the testimony that will govern and control, not what I tell you. If I have overlooked or failed to recite any of the testimony, it is no indication that it is not important testimony if you wish to attach importance to such testimony. It is for your judgment entirely and your recollection of such testimony which will control. As stated to you in the beginning of this charge, however, it is your duty to accept the law as stated to you by the Court, but, while it is your duty to accept the law as I have given it, you are the sole and exclusive judges of the facts. In your consideration of the evidence and in reaching your conclusion [fol. 159] as to the facts in this case you are the sole judges of the weight of the testimony and the credibility of the witnesses. It is right and proper in determining the weight to be given to the testimony of any witness that you take into consideration his interest, if any, in the result of the trial, his motive, if any, in testifying, and his opportunity for correct observation, his powers of recollection, the reasonableness and probability of his testimony, or any other matters in connection with the witness which, according to reason and in the light of reason, will aid in your determination as to the proper weight to be given to his testimony.

Since the plaintiff has two theories in this case, I will charge you separately on the law relating to the two theories. I have already told you that this action has been brought under the Safety Appliance Acts and under the Federal Employers' Liability Act.

With respect to his action under the Safety Appliance Acts, it is the law that the railroad has an absolute duty to provide properly operating and efficient brakes. If you believe that the brake in question was not a properly operating and efficient brake, as a result of which the plaintiff was injured, then your verdict must be for the plaintiff.

Insufficiency, under the Safety Appliance Acts pertaining to brakes, means any inadequacy, any impropriety, any short-coming, any excessiveness, or any reaction which is

out of the ordinary or abnormal and such as to subject the person using the brakes to risk of harm. If you think that the brake in this case may be classified under any of these descriptive adjectives and therefore was inefficient, your verdict must be for the plaintiff if you find that it was a contributing factor in causing the plaintiff's injuries. There is no special definition of what an inefficient brake consists of,—either inefficient or efficient brake. If a brake put to ordinary use fails to react in a normal manner as a result of which the plaintiff was injured, your verdict must be for the plaintiff.

If you believe that the brake in question was a kicking [fol. 160] brake and had too much spring in it so that the plaintiff was unable to control it, and it was therefore an inefficient brake, and was a contributing factor in the injury to the plaintiff, your verdict must be for the defendant.

The plaintiff does not assume any of the risks of his employment, and he has an absolute right to be provided with a safe and efficient brake. If you find that the brake in question was not safe or efficient, and that thereby the plaintiff was injured, your verdict must be for the plaintiff, regardless of the fact that you also find that the plaintiff violated one or more of the Company rules. Even if you find under this phase of the case that the plaintiff was guilty of contributory negligence, if you find that the defendant did not supply a safe brake, then the contributory negligence of the plaintiff shall not be considered by you in any degree of manner whatsoever because contributory negligence is not a defense where a violation of the Safety Appliance Acts is involved, and your verdict must be for the plaintiff if he was injured as the result of a defective brake.

As to the plaintiff's contention with respect to the Safety Appliance Acts phase of the case, if you find from the evidence that the brake was in proper operating or efficient condition, and that the plaintiff at the time he received his injuries was not operating the hand brake in the normal and proper manner, and that such conduct on his part was the sole proximate cause of his injury, then your verdict should be for the defendant. Mere evidence that the brakes spun rather violently when released is not evidence of any defect in the brake. Also, if you find that the brake in no way caused nor contributed in any injury to the plaintiff,

but that he became ill while on the ground, then your verdict must be for the defendant.

That brings me to the other phase of the plaintiff's case, the phase in which he seeks recovery under the provisions of the Federal Employers' Liability Act. This phase of the case relates to the alleged movement of the train. Of course, if in your consideration of the Safety Appliance [fol. 161] phase of the case concerning the alleged inefficient brake, you found that the brake was inefficient and contributed to the plaintiff's injury, then your verdict must be for the defendant and you need not consider the phase concerning the train movement. On the other hand, if you find that the hand brake was efficient or that it had nothing to do with the plaintiff's alleged injuries, then you must consider whether or not the plaintiff was injured because a fellow employee signaled for a movement of the cars without first knowing the whereabouts of the plaintiff or without warning or notice to the plaintiff, or without authority from the plaintiff as conductor of the train, to do so. If any fellow employee did so, such action would be negligence, and if this negligence resulted in the cars being moved, and the plaintiff was thrown to the ground causing the plaintiff's injury, the Railroad Company should be held responsible, and your verdict should be for the plaintiff. This is so even though you find the plaintiff was guilty of contributory negligence.

If you find any contributory negligence of the plaintiff contributed to his own injuries along with the negligence of any employee of the defendant, then you would reduce the amount of the plaintiff's verdict in proportion to the amount of negligence attributable to the plaintiff.

If you find there was no negligence on the part of the defendant company or any of its employees, or if you find there was no movement of the cars after they had been coupled, or if you find that the plaintiff was not injured by the hand brake nor thrown to the ground, or if you find he merely became ill from exhaustion while walking on the ground, in any of these events, your verdict should be for the defendant.

If your verdict is for the plaintiff, you then come to a consideration of the damages. If your verdict is for the plaintiff, you will award him that amount of the bills he has incurred for medical care and attention. Dr. Gayl's

bill was $21.00; Dr. Jepson's bill was $55.00; the hospital bill was $58.00,—these three bills amounting to $134.00.

[fol. 162] You will award him such sum as will fairly compensate him for his loss of earnings to date. It was testified that from January 1, 1944, to June 11, 1944, the date of the accident, a period of 163 days, he earned $2,027.86, or approximately $12.45 a day. From that time to the present, a period of 347 days, he earned $943.44, or approximately $2.72 per day, a loss of $9.73 a day; or a total loss of earnings since the date of the accident of approximately $3,375.00, provided, of course, his earnings if he had not been injured, since the accident would have averaged what they did in the months before June 11, 1944. Of course, if you find that he was able to work more since June 11, 1944, than he actually did, and was in condition to earn more money than he did since the accident, then his loss of earnings would be less, and the amount you award him for this item would be less.

You will remember the testimony of the different doctors concerning his condition since June, 1944, that should enable you to determine whether during the last eight months he worked as much as the condition warranted. These figures that I have given you are not binding upon you,—they are only figures that were introduced in evidence that may serve as a guide post to help you ascertain what would be the true measure of damages in the event that your verdict is for the plaintiff.

You shall also determine or ascertain damages as to whether or not the plaintiff has recovered as of today, or whether he is still disabled, and if you determine that he is disabled you will determine how long he will be disabled and to what degree, and then award such sum that will compensate him for the loss of future earnings, but reducing such sum to its present value.

He would also be entitled for compensation for any pain he has suffered or may suffer because of any injury he received in this accident. There is no legal yardstick to measure actually the amount of reasonable compensation to which plaintiff is entitled for pain and suffering. The [fol. 163] amount you allow for this must be guided by your good judgment.

You should carefully consider the testimony in this case, and in the light of your experience and your sound com-

non sense determine what compensation you think the plaintiff is entitled to for pain and suffering, if you decide the verdict should be for the plaintiff. If your verdict is for the defendant, you have nothing to do with damages, and will merely find for the defendant.

In conclusion I want to say to you, members of the jury, that it is your duty to consider this matter and come to a conclusion based solely upon the evidence in this case. You must not in any way be influenced by sympathy for any of these parties or prejudiced against any of the parties to this suit. You have been sworn to do,—and you must do,—equal justice to the parties, no more or less.

I think that concludes all I have to say to you, except I am going to send out with you what are known as interrogatories. I am going to ask you to answer these questions in writing, after you come to an agreement. Your agreement must represent your final, unanimous conclusion,—it cannot be a verdict unless it is the unanimous verdict on the part of the jury, and the answers to the questions must, of course, be unanimous.

I will read these questions that I will send out to you, and after you make your agreement and find your verdict, you will answer these either "yes" or "no".

The first question:

"Was the brake in question an efficient brake?"

Answer "yes" or "no".

"2. If you find that the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff?"

Answer "yes" or "no".

"3. Did the train move after the seven shifted cars were coupled to the three standing cars?"

Answer "yes" or "no".

[fol. 164] "4. If you find that the train moved after the cars were coupled, did that fact contribute or cause any injuries sustained by the plaintiff?"

Answer "yes" or "no".

"5. Was the plaintiff thrown from a moving train?"

Answer "yes" or "no".

"6. Did the plaintiff become ill while walking on the ground, without having been thrown from the train?"

Answer "yes" or "no".

Both counsel for the plaintiff and counsel for the defendant have submitted to me certain points for charge.

I affirm all of the plaintiff's points submitted, except point 18 and point 22, with the exception of these two points I think I have covered them all in my general charge, and will not read them.

Point 18 is refused as put.

Point 22 is refused as put.

The point submitted by defendant is refused.

Now, does counsel wish me to correct any misstatement or any fact of law that I have have made?

Mr. Richter?

Mr. Richter: I just want to take one exception.

The Court: If you want to do it at side bar?

Mr. Richter: I would rather.

(The following proceedings were had at side bar:

Mr. Richter: There is only one comment I want to make, Your Honor referred to the brake wheel spinning rather violently as not being evidence of inefficiency.

Mr. Heebner: I want to take exception to so much of Your Honor's charge as permits the jury to base their [fol. 165] verdict upon a defective condition of the brake or anything connected with the brake.

Your Honor charged the jury that if they found for the plaintiff they were entitled to find, as I understand, the extent of his future disability. I do not think there is any evidence that he is disabled now from earning.

The Court: I only said to what degree.

Mr. Heebner: But none of these doctors were asked whether he was capable of working, except my doctor.

The Court: I think you are right to a certain extent, but this is what I have in mind: Suppose his former job required heavy lifting, and Dr. Jepson said he couldn't do heavy lifting.

Mr. Richter: That is right.

Mr. Heebner: That is right.

The Court: He could be able to earn some money, and for that reason I said to what degree.

I will give you an exception.

Mr. Heebner: Also to Your Honor's refusal of my point for charge.

Also to the allowance of these points. I think you covered all of these.

The Court: I think I did, except these two.

Mr. Heebner: Will Your Honor grant me an exception to each of the affirmations of the plaintiff's points.

Mr. Richter: If any one of them are not affirmed as put——

[fol. 166] Mr. Heebner: I can exclude some if——

The Court: You can let it stand. But I do not think that is essential.

Mr. Heebner: 16, 17, 19, 20, 21, and 23, I have no objection to; I think they are all right. The others all concern the brakes.

The Court: All right.)

The Court: Now, swear the bailiff.

(The bailiff is duly sworn.)

You may now retire, members of the jury, and find your verdict. Do you have the exhibits,—Exhibits 1, 2, 4, and 5?

(The jury retires for deliberation.)

PLAINTIFF'S POINTS

(The points for charge submitted by the plaintiff read as follows:

"1. The defendant has an absolute and continuing duty of providing and maintaining its brakes in proper condition and safe to operate in active service without unnecessary peril to life or limb. If you believe that this brake was not in such condition, your verdict must be for the plaintiff."

"2. The railroad has an absolute duty to provide an efficient brake regardless of mechanical defect. If you believe that the brake in question was not an efficient brake your verdict must be for the plaintiff."

[fol. 167] "3. If you believe that the brake in question was a kicking brake, and it was therefore an inefficient brake, your verdict must be for the plaintiff."

"4. If you believe that this brake had too much spring in it, and therefore was not an efficient brake, your verdict must be for the plaintiff."

"5. If you believe that the brake in this case had such spring in it that the plaintiff was unable to control it and that it was therefore an inefficient brake, your verdict must be for the plaintiff."

"6. If you believe that this brake was abnormal and that its reaction on being tightened was not that which a brakeman has a right to expect upon applying it, as a result of which the plaintiff was thrown to the ground, your verdict must be for the plaintiff."

"7. If you believe that the plaintiff could have done something to protect himself, if you believe also that this brake was, notwithstanding that fact, inefficient, then your verdict must be for the plaintiff."

"8. If you believe that the defendant provided a car with a brake containing too much spring so that it was inefficient, then your verdict must be for the plaintiff."

"9. If you find that the plaintiff was injured because the brake in question was not efficient then there is absolutely no defense that the railroad can raise in this case and your verdict must be for the plaintiff."

"10. If you believe that the plaintiff was injured partly because the brake in question was not efficient, then your verdict must be for the plaintiff as the railroad can raise no defense."

"11. There is no special definition of what an efficient brake consists of. If a brake put to ordinary use fails to react in a normal manner as a result of which the plaintiff was injured, your verdict must be for the plaintiff."

"12. Inefficiency, under the Safety Appliance Acts pertaining to brakes means any inadequacy, any im- [fol. 168] propriety, any short-coming, any excessiveness, or any reaction which is out of the ordinary or abnormal, and such as to subject the person using the brake to risk of harm. If you think that the brake in this case may be classified under any of these descriptive adjectives and therefore was inefficient, your verdict must be for the plaintiff regardless of the fact that you also find that the plaintiff violated one or more of the company rules."

"13. Even if you find that the plaintiff was guilty of contributory negligence, if you find that the defendant did not supply a safe brake then the contributory neg-

ligence of the plaintiff shall not be considered by you in any degree or manner whatsoever because contributory negligence is not a defense where a violation of the Safety Appliance Acts is involved, and your verdict must be for the plaintiff."

"14. If you believe that the inefficiency of the brake was responsible in whole or in part for the accident in which the plaintiff was injured, then there is absolute duty on the part of the railroad company, and it is no excuse that the plaintiff may have violated one or more rules of the railroad company."

"15. The plaintiff does not assume any risk of his employment, and he has an absolute right to be provided with a safe and efficient brake. If you find that the brake in question was not safe or efficient, and that thereby the plaintiff was injured, your verdict must be for the plaintiff."

"16. If you believe that there was a movement of the train without warning or notice to the plaintiff as a result of which the plaintiff was injured, then such movement of the train would be negligence and your verdict must be for the plaintiff."

"17. If you believe this accident was not caused by the defendant providing a brake that was either unsafe or inefficient, but rather was caused by the negligence of one of the plaintiff's fellow employees in signalling [fol. 169] for a back-up move to couple the cars without first knowing the whereabouts of the plaintiff, then such action would be negligence for which the railroad company would be responsible, and your verdict must be for the plaintiff."

"18. If your verdict is for the plaintiff you shall award to the plaintiff a sum as will fairly compensate him for the lost earnings to date; and then you shall determine how long the plaintiff will be disabled and to what degree; and if you shall find that the plaintiff is permanently disabled then you will consider his age, his prior health, his living habits, and the expectancy tables which have been given to you, in determining the probable expectancy of his life, and you will consider the question of whether as life progresses the plaintiff would continue to earn as much as, or more than he was earning at the time of the accident, and you will then arrive at a figure that will represent the

total value of all of his probable earnings which sum you shall reduce to its present value and thereto you shall add such sum as will fairly and adequately compensate the plaintiff for all of his past, his present and the anticipatable pain and suffering that he endured and will endure as a result of the injury he received in this accident. You shall also add thereto such sum of money as you believe he will need for future medical care and attention."

"19. If you believe that this engine was pushed without authority from the plaintiff to do so, and that this sudden move caused the plaintiff to suffer injury, then such an action would be negligence, and your verdict must be for the plaintiff."

"20. If you believe that the engineer pushed these cars without ringing the bell or giving other notice or warning of intention to move the train and as a result thereof the plaintiff was injured, your verdict must be for the plaintiff."

[fol. 170] "21. If you believe that the engine was moved upon a signal given by anyone other than the plaintiff and that the said move was made at a time when the whereabouts of the plaintiff was unknown, then you may consider whether such action was negligence and if you believe it was, and that as a result thereof the plaintiff was injured, your verdict must be for the plaintiff."

"22. Even if you believe that the plaintiff gave a signal to move the cars, if the engineer, before the moving the cars, did not ring the bell to acknowledge this signal before moving the cars, then you will consider whether such act was a violation of Rule 30 of the company, requiring bells be rung before an engine is moved and whether such violation of this rule and failure to ring the bell was negligence and was the cause of the plaintiff's injury, your verdict must be for the plaintiff."

"23. Even if you think this accident was partly the plaintiff's fault, if you also believe it was partly the fault of the defendant in that one of its other employees was careless and thereby contributed to the accident then your verdict must still be for the plaintiff reduced in such amount as the plaintiff's conduct contributed to this accident.")

DEFENDANT'S POINTS

(The point for charge submitted by the defendant reads as follows:

"Under all the evidence in this case your verdict must be for the defendant.")

(Whereupon a recess is taken at 12:35 o'clock P. M., and thereafter the jury returns to open court, at 4.00 o'clock P. M. with its verdict.)

[fol. 171] The Deputy Clerk: Members of the jury, please rise.

(Jury rises.)

Do you have the answers to the interrogatories?

(The jury presents same.)

The Court: Yes, I would like to see them, first.

(The Court examines same.)

VERDICT.

(Thereupon, the jury returns its verdict finding in favor of the plaintiff and assesses damages in the sum of five thousand dollars, and the answers to the interrogatories as follows:

INTERROGATORIES TO JURY AND ANSWERS THERETO.

"1. Was the brake in question an efficient brake?
Answer "yes" or "no". No."

"2. If you find that the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff?
Answer "yes" or "no". Yes."

"3. Did the train move after the seven shifted cars were coupled to the three standing cars?
Answer "yes" or "no". No."

"4. If you find that the train moved after the cars were coupled, did that fact contribute to or cause any injuries sustained by the plaintiff?
Answer "yes" or "no". No."

[fol. 172] "5. Was the plaintiff thrown from a movin train?
Answer "yes" or "no". No."

"6. Did the plaintiff become ill while walking on the ground, without having been thrown from the train?

Answer "yes" or "no". No.")

The Court: Now, members of the jury, I have here the interrogatories. I see that you have answered all of these questions "no" except No. 2, which you have answered "yes".

Is that the way you find?

The Jury: Yes.

(Whereupon, the Court orders the verdict recorded, as above, and the jury is excused.)

End of Trial.

Reported by H. A. B. Schwartz.

In United States District Court

Judgment for Plaintiff—Filed May 24, 1945.

Before Bard, J.

And now, to wit: May 24, 1945, in accordance with the verdict, it is ordered that judgment be and is hereby entered in favor of Plaintiff, John Myers, and against Read-[fol. 173] ing Company, Defendant, in the sum of Five Thousand and 00/100 ($5000.00) Dollars, together with costs.

By the Court,

Attest: (s) Gilbert W. Ludwig, Deputy Clerk.

In United States District Court

Defendant's Motion to Set Aside Verdict and Judgment and for the Entry of Judgment in its Favor—Filed June 1, 1945.

And now, to wit this 1st day of June, 1945, Reading Company, by its counsel, Henry R. Heebner, having moved for a directed verdict at the close of the evidence, and the same not having been granted, moves the court to set aside

the verdict and judgment entered in favor of the plaintiff and against the defendant above named and to enter judgment in its favor for the following reasons:

1. There was insufficient evidence of negligence to support the jury's verdict.

Henry R. Heebner, Attorney for Reading Company.

[fol. 174] In United States District Court

Opinion on Motion for Judgment N. O. V.—Filed December 28, 1945.

Bard, J.

Defendant moves to set aside the verdict and judgment entered in favor of plaintiff and to have judgment entered in accordance with its motion for directed verdict under Rule 50 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, for the reason that there was insufficient evidence to support the verdict.

Plaintiff brought this action under the Federal Employers' Liability Act[1] and the Safety Appliance Act[2] to recover for injuries sustained while classifying coal hoppers at the Port Richmond yard of the Reading Company.

The evidence adduced at trial pertinent hereto follows:

Plaintiff was employed by defendant as a conductor in charge of a freight train shifting crew at its Port Richmond yard. In the early evening of June 10, 1944, the crew shifted seven coal cars and coupled them to three other cars standing near a bumper at the end of the classification track. The track was curved and, at the completion of the coupling operation, the engine was at the far end of the curve so that the engineer did not have a clear view of the other members of the crew. Plaintiff directed a new employee to set the brakes on each car in accordance with company regulations before the crew proceeded to a new operation. Plaintiff checked the cars and, when he

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[1] Act of April 22, 1908, c. 149 §1, 35 Stat. 65 as amended August 11, 1939, c. 685, §1, 53 Stat. 1404, 45 U.S.C.A. §51 et seq.

[2] Act of April 14, 1910, c. 160, §2, 36 Stat. 298, 45 U.S.C.A. §11.

reached the seventh car from the engine, discovered the brake had not been tightened. He then mounted the brake step or platform and began to tighten the brake.

[fol. 175] Plaintiff testified that he felt a movement of the train and a quick jar on his car, as though the slack was being run out in order to uncouple the engine; that he signaled "stop" with the lantern he was carrying on his left arm; that the wheel on the hand-brake kicked back; that he could not hold the brake; and that he fell to the ground injuring his back.

Several members of the switching crew appeared on behalf of defendant. They testified that the train did not move after the cars were coupled; that they found plaintiff on the ground but did not see him fall from the brake step; and that earlier in the evening plaintiff had complained of illness.

Under the provisions of Rule 49(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, I submitted six written interrogatories to the jury and instructed the jury to answer the interrogatories in writing and, in addition, to render a general verdict. The interrogatories and the answers thereto are set forth in the margin.[3] The jury returned a verdict in favor of plaintiff in the amount of $5000.

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[3] 1. Was the brake in question an efficient brake?
Answer "yes" or "no". No

2. If you find that the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff?
Answer "yes" or "no". Yes

3. Did the train move after the seven shifted cars were coupled to the three standing cars?
Answer "yes" or "no". No

4. If you find that the train moved after the cars were coupled, did that fact contribute to or cause any injuries sustained by the plaintiff?
Answer "yes" or "no". No

5. Was the plaintiff thrown from a moving train?
Answer "yes" or "no". No

6. Did the plaintiff become ill while walking on the ground, without having been thrown from the train?
Answer "yes" or "no". No

In the complaint and in the presentation of evidence, plaintiff offered two theories upon which recovery could be predicated. First, plaintiff contended that, while he was tightening the brake, the train moved without warning and [fol. 176] without authorization from plaintiff, who was train conductor in charge of the work, and that this movement constituted negligence on the part of defendant's employees which would justify recovery under the Federal Employers' Liability Act. Secondly, plaintiff contended that the brake was not efficient and constructed to his injuries, so that he was entitled to recover under the Safety Appliance Act.

As indicated in their answers to the interrogatories, the jury accepted a portion of defendant's evidence and found as a fact that the train did not move after the coupling operation. Thus the jury rejected plaintiff's theory of recovery for negligence under the Federal Employers' Liability Act.

However, the jury did find as a fact that the hand brake was inefficient and that it caused or contributed to plaintiff's injury.

Defendant moved for judgment non obstante veredicto on the ground that there was insufficient evidence to support a finding that the brake was inefficient and that, as a matter of law, plaintiff failed to make a case under the Safety Appliance Act. Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 61 S. Ct. 189, 85 L. ed. 147. In determining the motion for judgment non obstante veredicto I must assume that plaintiff's evidence proves all that it reasonably may be found sufficient to establish and must draw in favor of plaintiff all inferences which are fairly deducible from these facts. Baltimore & Ohio Railroad Company v. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. ed. 419; Hawkins v. Sims, 4th Cir., 137 F. (2d) 66; Aetna Casualty & Surety Co. v. Yeatts, 4th Cir., 122 F. (2d) 350. However, since the jury in answering the interrogatories found as a fact that the train did not move after the coupling operation, and there is adequate evidence to support that finding, I must accept that finding notwithstanding plaintiff's testimony to the contrary.

The sole question for determination here is whether there was sufficient evidence to permit the jury to base their ver- [fol. 177] dict for plaintiff upon a finding that the brake in question was not efficient.

The evidence with regard to the alleged inefficiency of the brake was extremely meager.[1] After reconciling plain-

[1] The plaintiff's testimony on direct examination was as follows:

Q. Suppose you describe to the jury just how you were standing, and what position your lantern was in, and what you were doing?

A. I had the lantern in this hand (indicating) and I got a hold of the hand-brake——

Q. What does the lantern have—a handle?

A. Yes, a handle.

Q. And you had your arm through the handle?

A. Yes.

Q. And what were you doing?

A. I was tightening the brake—it was kind of stiff and sticking—it was pretty hard to signal with the one hand and to get the brake on.

Q. With the ordinary brake wheel, do you have the difficulty that you had with this wheel?

A. Not ordinarily.

Q. What was the difference between this wheel and the ordinary wheel?

A. It was kind of stiff, and like a spring,—like a shoe kicking back.

Q. And you started to try to set it?

A. That is right.

Q. Had you given any orders to anybody to move this train?

A. I had not.

Q. Had you given any permission to anyone to move this train?

A. No permission at all.

Q. Had you given any signal to move this train?

A. I did not.

Q. Go on, and tell His Honor and the members of the jury what took place while you were standing up there?

A. As I was tightening the brake,—just that quick,—I felt something like the slack being run out, getting ready to uncouple.

Q. What did you feel on your car?

A. A quick jar, and I took this hand to signal "stop" (indicating).

(Footnote continued on next page)

tiff's evidence with the jury's answers to the interrogatories in a manner most favorable to plaintiff, the credible evidence offered by plaintiff on that issue appears to be as follows: Plaintiff stood on the brake step with a lantern hung over his left arm tightening the hand brake. The brake wheel was "kind of stiff and like a spring" and plaintiff testified that he ordinarily did not have as much difficulty with a brake wheel. Upon a mistaken belief that the train had begun to move, plaintiff signaled "stop" with the lantern on his left arm, holding the wheel with his right hand. Plaintiff could not hold the wheel, although it was not all the way on, and the wheel kicked back. Plaintiff fell to the ground and was injured. The jury found as a fact that the train did not move at any time after the cars were coupled and that plaintiff was not thrown to the ground from a moving train.

The Safety Appliance Act provides that all cars must be equipped with "efficient" hand brakes.[1] The purpose of

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Q. What did you signal?

A. I signaled "stop" the best I could and hold on, but I went down; I lost my hold and down I went.

Q. What happened to the wheel on the hand-brake while you were holding the wheel?

A. That kicked back.

Q. What do you mean by that?

A. I was putting it on this way (indicating), and it kicked right back off.

Q. Could you hold it?

A. No, I couldn't.

Q. Was it pulled all the way on?

A. Oh, no.

Q. What happened to you?

[fol. 178] A. Down I went.

Q. Why did you swing the lantern?

A. To stop—I didn't know whether they were moving on——

Q. Anyway, whatever that move was that caused the jar, you tried to stop it?

A. That is right.

Q. You didn't want them to move?

A. I did not.

[1] 45 U.S.C.A. §11.

the statute is to supplant the qualified common law duty of care of the railroad with an absolute duty. Therefore, if the railroad does not comply with the prescribed standard, it violates the law and must compensate those injured as a result thereof without regard to proof of negligence. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 S. Ct. 616, 52 L. ed. 1061.

In Didinger v. Pennsylvania R. Co., 6th Cir., 39 F. (2d) 798, the Court said, at page 799: "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by [fol. 179] showing a failure to function, when operated with due care, in the normal, natural, and usual manner." To the same effect see Altman v. Atlantic Coast Line R. Co., 5th Cir., 18 F. (2d) 405; Newkirk v. Los Angeles Junction Ry Co., 21 C. (2d) 308, 131 P. (2d) 535. Plaintiff made no attempt to prove a specific mechanical defect in the brake, but relied on the latter method of proof—namely that it failed to function normally although operated with due care.

Plaintiff relied on an alleged failure in performance of the brake when used with due care to raise the inference of some latent defect. Philadelphia & R. Ry. Co. v. Auchenbach, 3d Cir., 16 F. (2d) 550, certiorari denied 273 U. S. 761, 47 S. Ct. 476, 71 L. ed. 878. In order to prove the inefficiency of the brake in this manner, it was incumbent upon plaintiff to prove two facts: First, that he operated the hand brake with due care; second, that, when operated with due care, the hand brake failed to function in the normal, natural, and usual manner. Didinger v. Pennsylvania R. Co., supra.

To prove the first essential factor, plaintiff testified that he had difficulty in tightening the brake in the normal manner and demonstrated to the jury the manner in which he had tightened the brake. But it must be remembered that before plaintiff completed the braking operation he removed his left hand from the wheel to signal with his lamp. It seems to me that plaintiff's testimony and physical demonstration of the normal manner in which he tightened the brake can be applied only to that portion of the braking operation up to the moment when plaintiff gave the "stop" signal. At that moment plaintiff was

holding the partially tight... l brake wheel with one hand and it was at that moment when the wheel "kicked back". Was plaintiff operating the hand brake with due care at this moment? Plaintiff offered no evidence from which the jury could infer that plaintiff's attempt to hold a partially tightened hand brake with one hand was or was not careful operation of a hand brake.

[fol. 180] Even if it can be assumed that plaintiff performed the entire brake tightening operation with due care, he failed to produce evidence from which the jury could reach a rational conclusion as to whether the subsequent performance of the brake was in the normal, natural and usual manner. Plaintiff failed to introduce any evidence regarding the mechanism of the brake or any other evidence from which the jury could rationally deduce whether or not the "kick-back" or spinning of the brake wheel was the normal and usual performance of a brake wheel under the circumstances. Certainly, if an efficient wheel would "kick-back" under the same conditions, the jury could not be permitted to find that the brake was inefficient, merely because it spun around. Plaintiff failed to produce any evidence which would permit the jury to make a comparison between the performance of the brake wheel in the instant case and a purportedly normal reaction of a brake wheel under the same circumstances so that the jury might rationally conclude that the brake in question did not perform in a normal, natural and usual manner.

From the paucity of proof offered by plaintiff the jury might logically draw the inference that the brake was inefficient and might have just as logically drawn the inference that the brake reacted normally and efficiently under the circumstances. Since the evidence supports equally two inconsistent inferences of fact, it establishes neither. In this situation the jury should not have been permitted to draw conclusions from plaintiff's evidence regarding the inefficiency of the brake since their conclusion of necessity would have to be based on conjecture and speculation. Grand Trunk Western R. Co. v. Holstein, 6th Cir. 67 F. (2d) 780. The burden was upon plaintiff to prove that the brake acted inefficiently in order to recover. This he failed to do. Therefore, as a matter of law, judgment must be for defendant. Pennsylvania Railroad

Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. ed. 319; United States Fidelity & Guaranty Co. v. Des Moines [fol. 181] Nat. Bank, 8th Cir., 145 Fed. 273; Patton v. Texas and Pacific Railway Company, 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361.

Plaintiff has relied on a number of cases* which have allowed recovery upon proof that a hand brake failed to perform normally when operated with due care. These cases set forth the accepted interpretation of inefficiency under the hand brake provision of the Safety Appliance Act. However, they are all distinguishable on their facts from the instant case. In each of the cases cited by plaintiff there was adequate proof that plaintiff used the brake with due care in the normal and ordinary manner, and that the brake did not perform normally. There was also evidence as to the mechanical operation and safeguards of the brake. Thus in each of these cited cases the plaintiffs presented evidence from which the jury could find that the hand brake was inefficient and could return a verdict in their favor.

As a matter of law, plaintiff failed to prove a case by competent evidence under the Safety Appliance Act. Since the jury's verdict in favor of the plaintiff as indicated by the answers to the interrogatories, was based solely on a theory of recovery under that Act and plaintiff failed to prove a case under the Act as a matter of law, defendant is entitled to judgment non obstante veredicto. Montgomery Ward & Co. v. Duncan, supra; McGivern v. Northern Pac. Ry. Co., 8th Cir., 132 F. (2d) 213.

Defendant's motion for judgment non obstante veredicto is granted.

[fol. 182] In the United States District Court

Judgment in Favor of Defendant—Filed Dec. 28, 1945. Before Bard, J.

And now, to wit: December 28, 1945, in accordance with the opinion of the Court, it is ORDERED that the

* Didinger v. Pennsylvania R. Co., supra; Spotts v. Baltimore & O. R. Co., 7th Cir., 102 F.(2d) 160, certiorari denied 307 U.S. 641, 59 S.Ct. 1039, 83 L. Ed. 1522; Newkirk v. Los Angeles Junction Ry. Co., supra; Wild v. Pitcairn, 347 No. 915, 149 S.W.(2d) 800, certiorari denied 314 U.S. 638, 62 S.Ct. 72, 86 L. Ed. 512.

verdict and the judgment entered thereon in favor of the Plaintiff, John Myers, and against the Defendant, Reading Company, in the sum of Five Thousand ($5,000.00) Dollars; be and the same are hereby set aside.

It is further ORDERED that Judgment be and hereby is entered in favor of Defendant, Reading Company, and against the Plaintiff, John Myers with Costs.

By the Court:

Attest: Roland J. Greenwood, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS FROM THE JUDGMENT OF THE DISTRICT COURT—Filed Jan. 2, 1946.

Notice is hereby given that JOHN MYERS, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the order of the District [fol. 183] Court below granting judgment for the defendant, n.o.v. by directed verdict, on December 28, 1945.

B. Nathaniel Richter, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL —Filed Jan. 16, 1946.

To the Honorable, the Judges of said Court:

John Myers, appellant, herewith designates the following portions of the record to be contained in the record on appeal in the above entitled action.

1. Docket entries.
2. Complaint.
3. Answer.
4. Testimony, including interrogatories to jury and answers thereto.
5. Judgment in favor of plaintiff.
6. Defendant's motion for judgment n. o. v.
7. Opinion of the Court granting judgment n. o. v.
8. Judgment in favor of defendant.
9. Notice of appeal.
10. This appeal. [designation]

B. Nathaniel Richter, Counsel for Plaintiff.

[fol. 184] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9102

JOHN MYERS, Appellant,

v.

READING COMPANY

Appeal from the Judgment of the District Court of the United States for the Eastern District of Pennsylvania.

Argued May 20, 1946

Before Maris, Goodrich and McLaughlin, Circuit Judges.

OPINION OF THE COURT—Filed May 29, 1946

Per CURIAM:

In this case the District Judge set aside a verdict of a jury and entered judgment for the defendant. The general verdict was accompanied by special interrogatories the answers to which disposed of the main theory of the plaintiff's case. The District Court concluded that the [fol. 185] plaintiff, as a matter of law, had failed to make out a case under the statute. We agree with that conclusion.

Affirmed.

A true Copy:

Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 186] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9102

JOHN MYERS, Appellant,

vs.

READING COMPANY

Present: Maris, Goodrich and McLaughlin, Circuit Judges.

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

By the Court, Goodrich, Circuit Judge.

May 29, 1946.

Endorsements: Order Affirming Judgment, etc. Received & Filed May 29, 1946. Wm. P. Rowland, Clerk.

[fol. 187] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before this court at argument; and proceedings in this court, in the case of John Myers, Appellant, vs. Reading Company, No. 9102, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 7th day of June in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the United States the one hundred and seventieth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 186] SUPREME COURT OF THE UNITED STATES

No. 367, October Term, 1946

ORDER ALLOWING CERTIORARI—Filed October 14, 1946.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 5 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

Term, 1945. No. 367

JOHN MYERS,

Petitioner,

vs.

READING COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN H. HOFFMAN,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
510 North American Bldg.,
Philadelphia 7, Pa.,
Counsel for Petitioner.

Martin & Lyle, 404 Penfield Bldg., Phila., Pa.

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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1945. No.

JOHN MYERS,

Petitioner,

vs.

READING COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John Myers, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on May 29, 1946.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 63 F. S. 817.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on May 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTION PRESENTED.

Did not the Circuit Court of Appeals (3rd Cir.) err in affirming action of District Judge in entering judgment n. o. v. for defendant railroad where the District Judge admitted that from all the evidence the jury might logically draw the inference that the brake was inefficient, but he decided against the plaintiff on the sole theory that the evidence might likewise support the inference that the brake was normal?

CONSTITUTION AND STATUTE INVOLVED.

The Seventh Amendment to the Constitution of the United States which, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Safety Appliance Law, 45 U. S. C. A. Sec. 11, which, in part, provides:

> "* * * All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

STATEMENT OF THE FACTS.

Plaintiff, a conductor in charge of a freight train shifting crew, directed a new employee to set freight car brakes before uncoupling the engine, following a shifting movement. Plaintiff later checked the brakes and discovered one that had not been tightened. After mounting the brake step of the platform, he began to tighten the brake by winding its wheel. He had his left arm through a lantern handle to light the scene, but he was able to use both hands in winding the wheel (21a). As he began winding the brake, he immediately noticed that it was extraordinarily stiff and sticky (21a).

Even before the plaintiff had totally wound the wheel, its

tension had become so great that it kicked violently. It had not acted like a normal brake, but had had an unusual spring and kicked "like a shoe",—as though "the slack were being run out". So severe was the plaintiff's reaction to this abnormal brake operation that the plaintiff instinctively raised the lantern hand from the wheel and signalled for a stop, believing that, perhaps, the cars were unauthorizedly moving under him.

The wheel had literally taken itself out of the plaintiff's hand, resulting in a palsy of the left hand which, for months thereafter, gave him great difficulty. He suffered a bad sacro-iliac back condition which medical authorities attributed to a twisting, wrenching move consonant with the violent jar of the brake (116a).

The jury, as a special finding of fact specifically found that the cars were not moved, but that the injuries suffered by the plaintiff were due to an inefficient brake within the meaning of the Statute. Therefore, a verdict of $5000. was given for the plaintiff.

The defendant, thereafter, filed a Motion for Judgment N. O. V. The Court granted the defendant's Motion for Judgment N. O. V. on the theory that, although, concededly, the evidence would sustain a jury finding of an inefficient brake, it might equally have sustained a finding of an efficient brake, and that, therefore, the plaintiff had not met his burden of proof.

The plaintiff appealed to the Circuit Court of Appeals for the Third Circuit, which affirmed, per curiam.

This Petition for Certiorari follows.

SPECIFICATIONS OF ERROR TO BE URGED.

1. In entering judgment for the respondent.

2. In failing to reverse the Trial Court's order granting judgment n. o. v. for the respondent.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's Constitutional guarantee of trial by jury has been violated.

2. The decision of the United States Circuit Court of Appeals (3rd Cir.) is in direct conflict with the principle of the decision of this Court as expressed in LAVENDER v. KURN, 66 S. Ct. 740, decided Mar. 25, 1946.

3. LAVENDER v. KURN, supra, upheld the requirement of a jury trial in a case under the Federal Employers' Liability Act. The same principle should be reiterated as being likewise applicable to actions brought under the Safety Appliance Statutes.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

JOHN MYERS,
By: JOHN H. HOFFMAN,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Counsel for Petitioner.

BRIEF.

ARGUMENT.

The jury answered the following interrogatories as indicated:

1. Was the brake in question an efficient brake? Answer: No.
2. If you find the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff? Answer: Yes.

Evidence to support the jury's findings, that the brake in question was inefficient and that this inefficiency was the cause of the injuries, is found in such testimony as the following (pp. 20a and 177a):

"Q. And what were you doing?

A. I was tightening the brake—it was kind of stiff and sticking—it was pretty hard to signal with the one hand and to get the brake on.

Q. With the ordinary brake wheel, do you have the difficulty that you had with this wheel?

A. Not ordinarily.

Q. What was the difference between this wheel and the ordinary wheel?

A. It was kind of stiff, and like a spring,—like a shoe kicking back.

Q. And you started to try to set it?

A. That is right.

* * * * * * * *

Q. Go on, and tell His Honor and the members of the jury what took place while you were standing up there?

A. As I was tightening the brake,—just that quick,—I felt something like the slack being run out, getting ready to uncouple.

Q. What did you feel on your car?

A. A quick jar, and I took this hand to signal 'stop' (indicating).

Q. What did you signal?

A. I signaled 'stop' the best I could and hold on, but I went down; I lost my hold and down I went.

Q. What happened to the wheel on the hand-brake while you were holding the wheel?

A. That kicked back.

Q. What do you mean by that?

A. I was putting it on this way (indicating), and it kicked right back off.

Q. Could you hold it?

A. No, I couldn't.

Q. Was it pulled all the way on?

A. Oh, no.

Q. What happened to you?

A. Down I went.

Q. Why did you swing the lantern?

A. To stop—I didn't know whether they were moving on ——

Q. Anyway, whatever that move was that caused the jar, you tried to stop it?

A. That is right."

In addition, the extraordinary amount of spring was further indicated by the fact that the plaintiff suffered a severe sprain in the fourth and fifth fingers of the left hand. As late as five months after the accident, these fingers were still numb and had developed an ulnar palsy. This showed that the force with which the wheel released itself was so great that it virtually destroyed the nerves in both fingers when the petitioner tried to hold the wheel as it began to swing free.

The fact that the fingers were so hurt proved conclusively that the petitioner must have had his left hand *on the wheel* (the hand from which the lantern was suspended) when it kicked back after having been put on. In any event, it supports an inference that there was a bi-manual operation of the wheel at the time it kicked. At least, therefrom the jury could so conclude.

Furthermore, the nature of the other injury, to wit: the bad sprain in the lower back was consonant with this type of brake reaction. The history that the petitioner gave upon admission to St. Joseph's Hospital attributed the back injury to the sudden kick of the brake (116a).

Dr. Lefkoe had there attributed the back injury to the kick of the brake:

> "Q. What would be the cause of the condition that you found when you examined him?
>
> A. The sudden pull, with more or less twisting motion * * *."

But, any doubts on the question as to whether there was evidence to support the jury's findings are dispelled by the affirmative admission of the trial judge himself.

In the opinion granting judgment n. o. v. for the respondent, the District Court stated:

> "From the paucity of proof offered by plaintiff the jury might logically draw the inference that the brake was inefficient and might have just as logically drawn the inference that the brake reacted normally and efficiently under the circumstances. Since the evidence supports equally two inconsistent inferences of fact, it establishes neither. In this situation the jury should not have been permitted to draw conclusions from plaintiff's evidence regarding the inefficiency of the brake since their conclusion of necessity would have to be based on conjecture and speculation."

In effect, the learned judge conceded that there was evidence supporting the plaintiff's contentions, but he, nevertheless, concluded to grant the judgment N. O. V. only after a careful search of the record to find evidence sustaining contrary inferences in favor of the defendant. *This action of the Court below was, we submit, condemned by LAVENDER v. KURN, supra.*

There an action was brought under the Federal Employers' Liability Act for the death of an employee. There were no eye witnesses to the fatal blow which resulted in death, and it was controverted whether the death resulted through the felonious act of unknown third persons or whether it resulted from circumstances surrounding the decedent's employment from which negligence could be inferred. Concededly, the inferences of negligence practically necessitated the application of conjectural inference. The Supreme Court of Illinois declined to accept the jury's finding of negligence. The United States Supreme Court, on certiorari, emphatically reversed. Its opinion, in part, stated as follows:

> "The evidence we have already detailed demonstrates that there was evidence from which it *might* be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn * * *.
>
> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the

credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co,, 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Italics ours.)

It is submitted that under the LAVENDER case, supra, the United States Supreme Court has repudiated all earlier decisions, including P. R. R. v. CHAMBERLAIN, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 319, basically relied upon below, and that, therefore, in the light of the lower court's admission that there was evidence supporting the plaintiff's contention, the jury's verdict should not have been disturbed. That the LAVENDER case has already had widespread recognition and influence might be readily observed by

reading the opinion of Judge Major in GRISWOLD v. GARDNER, 155 F. 2d 333 (May 15, 1946) (7th Cir.), where we find the following language:

> "Any detailed review of the evidence in a case of this character for the purpose of determining the propriety of the trial court's refusal to direct a verdict would be an idle and useless ceremony in the light of the recent decisions of the Supreme Court. *This is so regardless of what we might think of the sufficiency of the evidence in this respect.* The fact is, so we think, that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees * * *.
>
> "The case of Lavender v. Kurn, supra, the latest decision of the Supreme Court under the Federal Employers Liability Act, leaves little room for doubt but that a directed verdict by a trial court or a holding by any court sustaining a directed verdict will not meet with favor, even though the verdict involves speculation and conjecture * * *.
>
> "That the Supreme Court treats the question of negligence and proximate cause as a jury question in this class of cases is clearly shown by a study of these cases. *Moreover, not only are these issues to be decided by the jury but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict.*" (Italics ours.)

CONCLUSION.

It is respectfully urged that it would be arbitrary to restrict the views and principles announced by this Honorable Court in LAVENDER v. KURN solely to cases arising under the Federal Employers' Liability Act, and that the same

principles should be reiterated as applicable to cases arising under the Safety Appliance Statute, which is essentially pari materia.

Therefore, the original verdict of the jury should be ordered reinstated.

Respectfully submitted,

JOHN H. HOFFMAN,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1945. No.

JOHN MYERS,

Petitioner,

vs.

READING COMPANY,

Respondent.

ADDENDUM TO ARGUMENT.

Evidence has been outlined, on pages 6-8 of this Brief, which supports the jury's finding that the brake in question was inefficient. In that connection, attention is respectfully directed to the additional significant circumstance, noted in the Statement of Facts, that before plaintiff attempted to set this brake, another employee, Hinkle, had been directed to set all the brakes (on seven cars), including that on the car in question. The uncontroverted testimony shows that Hinkle succeeded in setting the brakes on all the cars, except the one in question (19a).

Why, of all the brakes which Hinkle was ordered to set, and all of which he purported to set, was this one the sole exception? It is submitted that Hinkle's failure to set the brake on this one car alone is material evidence from which the jury could reasonably infer

(a) either that the brake on this particular car had been set by Hinkle, but because of a defect, had subsequently released itself or

(b) that Hinkle had tried to set the brake, but found it too stiff and tense and therefore abandoned the task entirely.

In either event, the jury was justified in inferring negligence.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946. No. 367.

JOHN MYERS,
Petitioner,

v.

READING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PHILADELPHIA 9, PA.
Counsel for Respondent.

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Federal Safety Appliance Act of March 2, 1893, 27 Stat. 31, c. 196, 45 U. S. C. A. Sec. 11, as amended 2

Lavender *v.* Kurn, 66 Supreme Court 740, 90 L. Ed. 692 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946. No. 367.

John Myers, Petitioner,

v.

Reading Company, Respondent.

STATEMENT OF QUESTION INVOLVED.

Did the United States Circuit Court of Appeals for the Third Circuit err in affirming the judgment entered for the Respondent railroad, where the evidence fails to support the averment that the petitioner was injured by an inefficient or defective brake?

STATEMENT.

On June 10, 1944, the Petitioner was a freight conductor in charge of a shifting crew at the Port Richmond yard of the Respondent and engaged in the furtherance of interstate transportation. Early in the evening of that day the crew had shifted seven coal cars and coupled them to three other coal cars standing near a bumper on one

of the tracks in the yard. The petitioner in checking the draft to see that the brakes had been applied, found that the brakes on the seventh car from the engine had not been applied. While the engine was coupled to the draft, Petitioner mounted the brake step of the seventh car and began to apply the brake. As he was tightening the brake with his lantern over his left arm, he felt a jolt on his car as the car moved eastward. He then removed his left hand from the brake wheel to give a stop signal with his lantern and as he did so the wheel on the brake "kicked back" and he fell to the ground injuring his back. The petitioner sued under the Federal Employer's Liability Act of April 22, 1908, c. 149, 35 Stat. 65; 55 U. S. C. A. Sec. 51 *et seq.*, as amended, and the Federal Safety Appliance Act of March 2, 1893, 27 Stat. 31, c. 196, 45 U. S. C. A Sec. 11 as amended, alleging negligence in the unauthorized movement of the train and in supplying a defective brake and couplings upon the car in question.

Most of the allegations in the Complaint and most of the evidence as to the occurrence related to the movement of the draft of cars without any signal from the petitioner, but the jury, in answer to interrogatories propounded by the trial Judge, found that the draft of cars did not move after the seven cars had been coupled to the three that were already standing, but that the brake which the petitioner was applying was not efficient (171a). There was no evidence regarding the type of brake nor were there any details as to its mechanism other than what is contained in the testimony of the petitioner (20a-22a, 177a) where the petitioner described the brake as "kind of stiff" and "sticking".

At the conclusion of the trial, the jury rendered a verdict for the plaintiff in the sum of $5,000., following which a motion to set aside the verdict and for the entry of judgment for the respondent was filed and granted by the District Court. This judgment was affirmed by the Circuit Court of Appeals for the Third Circuit.

ARGUMENT.

Since there was no evidence of any defective coupling, and the jury found that there was no movement of the car after the coupling of the three cars with the seven cars had been completed, the issue on appeal was confined solely to the question as to whether or not there was sufficient evidence of an inefficient or defective brake to warrant submission of the case to the jury. There is nothing in the record to indicate the type of brake other than the fact that it had a wheel, nor is there any description of its mechanism. There is not the slightest basis for any inference that the brake failed to function while it was being applied, that it was defective in any way, or that it failed to react in a perfectly normal manner after the petitioner released his hold upon it. According to the petitioner's own testimony, it wasn't the action of the brake that caused him to lose his grip and fall, but the jolt of the cars which caused him to remove one hand from the brake wheel for the purpose of giving a stop signal and that when he did so he could not hold with his other hand the brake which he had partially applied and it immediately kicked back or spun around. The petitioner's testimony shows that the brake was not only effective but reacted properly when he released the tension by removing his hand.

The case is similar on its facts to that of *Burnett* v. *Pennsylvania Railroad Co., 33 Fed. 2d 579* (C. C. A. 6th Circuit), where plaintiff claimed a defective hand brake on a freight car caused it to spin violently, throwing him to the ground. It appeared from the plaintiff's testimony that the brake had been set tight and in endeavoring to release it plaintiff used a club thereby increasing the tension on the brake chain and relieving the dog and ratchet lock. At the same time he held the rim of the wheel with his right hand and kicked at the dog with his left foot. A directed verdict for the defendant on the ground that there

was insufficient evidence of an inefficient brake was affirmed on appeal in an opinion reading in part as follows (p. 580):

> "His own voluntary act increased that tension before it took effect. If having thus increased the stress and increased the danger, his hand slipped and the reversing force caught him unready, that was not the result of defective apparatus. The more probable way in which a defect can lead to such a result as this is that it causes, when set, an imperfect holding by dog and ratchet or otherwise, so that there is a 'trigger catch', or some such condition, and the brake releases without the brakeman's intention and before he is ready for it; but here his testimony excludes any such theory."

The petitioner claims the right to a certiorari by reason of the decision in *Lavender* v. *Kurn, 66 Supreme Court 740, 90 L. Ed. 692,* decided March 25, 1946, and argues that the lower court's opinion was based solely upon the ground that since the evidence supports equally two inconsistent inferences of fact, it established neither, since the jury might have inferred that the brake was inefficient as logically as they might have inferred that it was efficient. In that case, however, the facts from which the jury was permitted to draw the inference were in dispute and the Court held that if the plaintiff's or petitioner's version of the facts were believed, there was an evidentiary basis for the verdict in his favor and the jury was free to disbelieve whatever facts were inconsistent with its conclusion. In the instant case, on the contrary, there is no dispute on the facts which are established solely by the petitioner himself and they furnish no basis for the finding of the jury. Mr. Justice Murphy, in his opinion in Lavender *v.* Kurn, states the distinction in the following language (p. 696 of Lawyers Edition):

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different infer-

ences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

The petitioner did not claim that his injuries arose as a result of the pressure exerted when he applied the brake and the evidence shows that his injuries were not sustained as a result of its application. The result followed his voluntary act in removing his hold from the brake wheel as he gave the signal to stop what he testified was a movement of the cars. Therefore, the decision in Lavender *v.* Kurn, *supra,* has no application whatever to this case.

CONCLUSION.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied for the reasons hereinabove set forth.

Respectfully submitted,

WM. CLARKE MASON,
HENRY R. HEEBNER,
2107 Fidelity-Philadelphia
Trust Building,
Philadelphia 9, Pa.
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 367.—October Term, 1946.

John Myers, Petitioner, v. Reading Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 2, 1947.]

Mr. Justice Burton delivered the opinion of the Court.

This action for damages alleged to have been caused to the petitioner by the respondent's use, in violation of the Safety Appliance Acts,[1] of a railroad freight car not equipped with efficient hand brakes, presents the question whether the evidence at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict for the petitioner. We hold that it was.

The action was brought in the District Court of the United States for the Eastern District of Pennsylvania by the petitioner, John Myers, against his employer, the Reading Company. He claimed that he received personal injuries caused by the respondent's use in interstate commerce, in its railroad yards at Port Richmond, Philadelphia, of a freight car equipped with a defective hand brake in violation of the Safety Appliance Acts requiring

[1] "Sec. 2. . . . it shall be unlawful for any common carrier subject to the provisions of this Act [of April 14, 1910] to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and *efficient hand brakes;* all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: . . . ." (Italics supplied.) 36 Stat. 298, 45 U. S. C. § 11.

such cars to be equipped with "efficient hand brakes."[2] At the close of the evidence, respondent moved for a directed verdict. The motion was not granted, and the jury returned a verdict for $5,000 in favor of the petitioner. The respondent then moved to have the verdict set aside and to have judgment entered in its favor.[3] On December 28, 1945, this motion was granted and judgment was so entered. 63 F. Supp. 817. On May 20, 1946, the Circuit Court of Appeals for the Third Circuit affirmed the judgment, *per curiam*. 155 F. 2d 523. We granted certiorari in order to review this procedure, in a case based upon a violation of the Safety Appliance Acts, in the light of our decision rendered on March 25, 1946, in *Lavender* v. *Kurn*, 327 U. S. 645, subsequent to the trial of this case.

The petitioner testified to the following:

On June 11, 1944, he was working for the respondent as a freight conductor in charge of a crew consisting of an engineer, a fireman and two brakemen. He had been employed by the respondent for six or seven years, rising from the rank of crossing watchman to that of conductor and, for five or six months immediately preceding June 11, he had worked practically every day in the job in which he was engaged when injured. At about nine o'clock that evening his crew moved a string of seven coal-cars on to a yard

[2] See note 1, *supra*.

[3] "RULE 50. MOTION FOR A DIRECTED VERDICT.

"(b) RESERVATION OF DECISION ON MOTION. . . . Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . . If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . ." Federal Rules of Civil Procedure.

track where the crew coupled those cars to three others. One of the brakemen, new on the job that day, made the coupling and the petitioner directed him "to tie the hand-brakes on"—that is, to tighten them so as to insure against further movements of the cars on the slightly graded track. The brakeman did this, but before the petitioner left the cars he checked them over and saw that the brakes were not all on, because one brake chain, instead of being wrapped around the shaft, was hanging loose. He climbed up on the brake platform, eight feet above the ground, on the car where the hand brake was not set, and tried to set it by turning the brake wheel. While doing this, he carried his signaling lantern on his left arm with his hand through the handle. As to the condition and operation of the brake he testified:

"A. I was tightening the brake—it was kind of stiff and sticking—it was pretty hard to signal with the one hand and to get the brake on.

"Q. With the ordinary brake wheel, do you have the difficulty that you had with this wheel?

"A. Not ordinarily.

"Q. What was the difference between this wheel and the ordinary wheel?

"A. It was kind of stiff, and like a spring—like a shoe kicking back.

"Q. And you started to try to set it?

"A. That is right.

. . . . . .

"A. As I was tightening the brake—just that quick—I felt something like the slack being run out, getting ready to uncouple.

"Q. What did you feel on your car?

"A. A quick jar, and I took this hand to signal 'stop.' (Indicating.)

"Q. What did you signal?

"A. I signaled 'stop' the best I could and hold on,

but I went down; I lost my hold and down I went.

"Q. What happened to the wheel on the hand-brake while you were holding the wheel?

"A. That kicked back.

"Q. What do you mean by that?

"A. I was putting it on this way (indicating), and it kicked right back off.

"Q. Could you hold it?

"A. No, I couldn't.

"Q. Was it pulled all the way on?

"A. Oh, no.

"Q. What happened to you?

"A. Down I went."[4]

The jury found, in a special verdict, that the brake was not an efficient brake; that its inefficiency contributed to or caused injuries to the petitioner; that the train did not move after the seven shifted cars were coupled to the three standing cars; and that the petitioner was not thrown from a moving train.[5] The jury thus reached factual con-

[4] Further testimony stated that his injuries were due to this fall. Other testimony supported the petitioner's claim, under the Federal Employers' Liability Act, 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51, that the respondent was negligent in moving the train while the petitioner was trying to tighten the brake and without any direction from him. This charge, however, was disposed of by the special verdict of the jury, stating that the train did not move, thus strengthening the probative force of the testimony that the petitioner's fall was caused by the stiffness and kickback of the brake.

[5] The special verdict was as follows:

"1. Was the brake in question an efficient brake?

Answer 'yes' or 'no.' [Answer] No

"2. If you find that the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff?

Answer 'yes' or 'no.' [Answer] Yes

"3. Did the train move after the seven shifted cars were coupled to the three standing cars?

Answer 'yes' or 'no.' [Answer] No

"4. If you find that the train moved after the cars were coupled,

clusions supporting its general verdict for the petitioner, and reducing the legal basis for recovery to the respondent's use of a car not equipped with efficient hand brakes.

The only question before us is whether there was sufficient probative evidence, with the inferences that the jury could draw from it, to support the verdict for the petitioner.

There was an absolute and unqualified prohibition against the respondent's using or permitting to be used, on its line, any car not equipped with "efficient hand brakes."[6] In speaking of a like prohibition, imposed by the same Section of the Safety Appliance Acts, against the use of any car not equipped with "secure hand holds or grab irons," Mr. Chief Justice Hughes said:

> "This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous." *Brady* v. *Terminal R. Assn.*, 303 U. S. 10, 15, and cases there cited.

See also, *Atlantic City R. Co.* v. *Parker*, 242 U. S. 56, 59 (automatic couplers required by 27 Stat. 531, 45 U. S. C. § 2); *Great Northern R. Co.* v. *Otos*, 239 U. S. 349, 351 (couplers); *Chicago, B. & Q. R. Co.* v. *United States*, 220 U. S. 559, 574–575; *St. Louis & Iron Mountain R. Co.* v.

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did that fact contribute to or cause any injuries sustained by the plaintiff?

Answer 'yes' or 'no.' [Answer] No

"5. Was the plaintiff thrown from a moving train?

Answer 'yes' or 'no.' [Answer] No

"6. Did the plaintiff become ill while walking on the ground, without having been thrown from the train?

Answer 'yes' or 'no.' [Answer] No"

[6] See note 1, *supra*.

Taylor, 210 U. S. 281, 294–295 (couplers and drawbars); *Spotts* v. *Baltimore & O. R. Co.*, 102 F. 2d 160, 162 (hand brakes).

This simplifies the issue beyond that presented in the ordinary case under the Federal Employers' Liability Act where the plaintiff must establish the negligence of his employer. Here it is not necessary to find negligence. A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries was on a car which the railroad was then using on its line, in interstate commerce, and that the brake was not an "efficient" hand brake. Furthermore—

> "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner." *Didinger* v. *Pennsylvania R. Co.*, 39 F. 2d 798, 799.

> "Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Philadelphia & R. R. Co.* v. *Auchenbach*, 3 Cir., 16 F. 2d 550. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. . . .
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> . . . . . .
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> ". . . the testimony of plaintiff that the brake was

used in the normal and usual manner and failed to work efficiently but did so inefficiently, throwing him to the ground, is such substantial evidence of inefficiency as to make an issue for the jury. *Detroit, T. & I. R. Co.* v. *Hahn*, 6 Cir., 47 F. 2d 59. In other words, we cannot say as a matter of law that any and all inferences which the jury might reasonably draw from the evidence would support only a verdict for defendant and not one for plaintiff." *Spotts* v. *Baltimore & O. R. Co., supra*, at p. 162.

See also, *Wild* v. *Pitcairn*, 347 Mo. 915, 149 S. W. 2d 800; and *Newkirk* v. *Los Angeles Junction R. Co.*, 21 Cal. 2d 308, 131 P. 2d 535.

The inefficiency of the brake in this case may have consisted of its defective condition or its defective functional operation resulting, in either case, in its knocking from the brake platform an experienced railroad man attempting to tighten or set the brake in the customary manner described in his testimony. That testimony was not descriptive of precise mechanical defects in the structure of the brake. It was, however, simple and direct testimony from which a jury reasonably might infer the brake's defectiveness and its inefficiency in the sense necessary to establish a violation of the Safety Appliance Acts. After a brakeman had attempted to set all of the brakes, the chain on this brake still hung loose, indicating that it was not set. When the brake was partially tightened by an experienced freight conductor familiar with that kind of an operation, he found that it differed from the ordinary brake. He found that "it was kind of stiff, and like a spring—like a shoe kicking back." While he was holding the wheel, before it was "pulled all the way on," it "kicked back," he couldn't hold it, and "down" he went. This resulted in serious injuries to his hand and back. While different conclusions might be possible, the jury, which heard the testimony and saw the petitioner's illustrations

of his handling of the brake, reasonably could infer from that evidence that the condition of this brake and its action were not those of an efficient hand brake.

The questions at issue were questions of fact. The jury was entitled to draw inferences from the evidence. From the evidence presented, the jury reasonably could find, as it did in its special verdict, (1) that the brake was not an efficient brake, and (2) that the fact that the brake was not an efficient brake contributed to or caused injury to the petitioner. In the face of this, the trial court erred in entering a judgment for the respondent in accordance with the motion for a directed verdict.

The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law.[1] As an interstate common carrier, however, it is subject to liability for injuries to its employees resulting from its violation of its absolute duty to comply with the Safety Appliance Acts. The evidence here was sufficient to support the verdict for the petitioner, whether tested by the formula used by this Court in *Improvement Co.* v. *Munson*, 14 Wall. 442; *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; or *Lavender* v. *Kurn*, *supra*. The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict.

> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' *Galloway* v. *United States*, 319 U. S. 372, 395; . . . ." *Tennant* v. *Peoria & P. U. R. Co.*, *supra*, at pp. 32–33.

[1] See *Griswold* v. *Gardner*, 155 F. 2d 333, 334, 337.

See also, *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600; *Brady* v. *Southern R. Co.*, 320 U. S. 476; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Western & A. R. Co.* v. *Hughes*, 278 U. S. 496; and *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 524.

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender* v. *Kurn, supra,* at p. 653.

We believe that the evidence given at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict originally rendered for the petitioner. Accordingly, the judgment of the Circuit Court of Appeals sustaining the judgment entered for the respondent by the District Court is hereby

Reversed.